Protasco Bhd v Tey Por Yee & Anor and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02 (i)-47–09 OF 2020 (W), 02 (i)-48–09 OF 2020 (W) AND 02 (i)-49–09 OF 2020 (W)

ZAWAWI SALLEH, HASNAH HASHIM AND RHODZARIAH BUJANG FCJJ

23 AUGUST 2021

Banking — Banks and banking business — Bankers' books — Bankers' Books (Evidence) Act 1949 ('BBEA') — Plaintiff obtained court orders under BBEA allowing it to inspect and take copies of bankers' book entries concerning accounts of its directors — Plaintiff had sued directors for conspiracy to defraud it and injure its business and for breach of fiduciary duties — Plaintiff sought to show from documents obtained under BBEA Orders that directors had siphoned off for themselves plaintiff's monies using third-parties — Defendants objected to admissibility at trial of documents obtained under BBEA Orders on ground plaintiff had not obtained order for discovery under O 24 of Rules of Court 2012 ('ROC') before making BBEA applications — Whether BBEA allowed for discovery independent of O 24 — Whether documents plaintiff had obtained under BBEA Orders fell within scope of BBEA — Whether plaintiff had satisfied all requirements under BBEA to allow documents to be admitted as evidence — Whether even if documents obtained by plaintiff fell outside scope of BBEA they could still be admitted in evidence under Evidence Act 1950

The appellant ('Protasco') brought an action in the High Court against its former directors (the respondents) and a company in which they had personal interest ('PT ASU') for damages arising from: (a) an alleged conspiracy between the respondents and PT ASU to defraud Protasco and injure its business; and (b) the breach by the respondents of their fiduciary duties to Protasco. In the suit, Protasco sought to recover USD27m from the defendants. That sum, it claimed, was the amount the respondents and PT ASU had cheated Protasco of and benefitted from personally. In order to obtain evidence of the money trail, Protasco applied for orders under the Bankers' Books (Evidence) Act 1949 ('the BBEA') to inspect and take copies of bankers' book entries in various banks in which the respondents, PT ASU and their related or connected entities maintained accounts. The High Court granted the applications sought. When Protasco sought to admit some of the documents it had obtained under the BBEA Orders at the trial, the respondents objected to their admissibility on several grounds including: (i) that Protasco had failed to obtain an order for discovery under O 24 of the ROC and could not use the BBEA as a means of obtaining discovery; (ii) several of the documents sought for or obtained by Protasco did not fulfill the

definition of 'banker's books' under the BBEA and were therefore precluded from disclosure; (iii) the 'disputed documents' could not be admitted into evidence because certain requirements of proof under the BBEA in relation to those documents had not been complied with. The respondents argued that disclosures of documents that fell outside the scope of the BBEA had breached banking secrecy laws under the Financial Services Act 2013. The Court of Appeal reversed the High Court's decision and held that: (A) the BBEA was only intended to facilitiate the proving of copies of entries in banker's books and could not be used to take the place of an order for discovery under O 24 of the ROC; (B) for specific discovery of documents, Protasco should have first applied for an order for discovery under O 24 of the ROC before applying for the BBEA Orders; (C) all requirements of the BBEA had to be complied with before the copies of entries in the banker's books could be admitted into evidence; and (D) the High Court judge failed to identify which of the disputed documents were 'banker's books' and which of them were not. Protasco was granted leave to appeal to the Federal Court on the following questions of law: (1) whether s 7 of the BBEA empowered a court to make orders for discovery independently of O 24 of the ROC; and (2) whether the definition of 'banker's book' in the BBEA had to take into account current practices in the ordinary business of a bank.

Held, by majority, setting aside the Court of Appeal's decision and affirming the decision of the High Court:

(1) **(per Hasnah Hashim FCJ, dissenting)** While s 7 BBEA enabled a party to any legal proceedings to apply for an order to inspect and take copies of any entries in a banker's book for the purpose of such proceedings, the BBEA could not be invoked for the purpose of discovery which could only be done in accordance with the procedure provided for under O 24 ROC. Section 7 BBEA could not be utilised as a back-door attempt at obtaining evidence from a bank outside of the disclosure rules provided under O 24 ROC. Protasco did not make any application for discovery under O 24. Its applications in both encls 307 and 395 were for specific discovery of documents and therefore they had to adhere to the specific legal framework for that purpose under O 24. Protasco ought to have first established its right to discovery under O 24. The High Court judge plainly erred in holding that s 7 BBEA enabled Protasco the right to discovery. Such a view was contrary to the intent and purpose of the BBEA and the mandatory confidentiality framework under ss 133(1) and 134 of the Financial Services Act 2013 (see paras 59, 62, 66, 71 & 73).

(2) **(per Hasnah Hashim FCJ, dissenting)** As held by the Court of Appeal, the High Court judge failed to identify which of the disputed documents were 'banker's book' or otherwise. Those documents which were not copies of entries in banker's books were outside the scope of the BBEA and had to be excluded. The BBEA required Protasco to prove and verify

those of the disputed documents that fell within the scope of the BBEA. In encl 307, Protasco applied to not only inspect and take copies of all entries in the books of the banks with regard to the respondents' accounts, but to also obtain information and documents in their possession concerning non-parties to the suit. Protasco had also sought an order that it be given the liberty to use any information and/or documents obtained under the BBEA Orders for the purposes of any legal proceedings whether in Malaysia or elsewhere which were ancillary and/or connected to the instant proceedings as deemed appropriate by Protasco. Vide encl 395, Protasco sought an order that the disputed documents be admitted as evidence and marked as exhibits in the suit pursuant to ss 2, 3, 4, 5 and/or 6 BBEA even though there were documents that did not fall within the definition of 'banker's book' as defined under s 2 BBEA and even though none of the said documents had been verified and proven as required under ss 4 and 5 BBEA (see paras 60–64, 85 & 87).

(3) **(per Hasnah Hashim FCJ, dissenting)** the subjective views of a judge on what ought to be included as 'banker's book' could not prevail over what was prescribed by the written laws. Although the Courts in Singapore had adopted a broader understanding of the definition under its banker's books framework, such an approach could not be adopted in Malaysia. The Court must interpret legislation purposively and not import words that were not there. Purposive interpretation was permitted only to the extent allowed by the law. It was not for the Courts to legislate but to only interpret the law as intended by Parliament (see paras 82–83).

(4) **(per Rhodzariah Bujang FCJ, majority)** O 24 r 7A of the ROC only came into being when the ROC 2012 was enacted whereas the BBEA was legislated way back in 1949 modelled on the United Kingdom's Bankers' Books Evidence Act 1876. Given the co-existence of the BBEA and the ROC on an almost identical subject-matter, the principle of generalia specialibus non derogant applied and since the BBEA was enacted to specifically deal with banking documents, then that should be the law which should govern them and not the general provisions in the ROC. Although the BBEA came into existence decades before the ROC or even the Rules of the High Court 1980 came into being, that did not automatically mean that s 7 of the BBEA was subject to the procedural requirements of discovery under O 24 of the ROC. From the way O 24 was enacted, it was obvious that inspection of documents was a natural consequence of an order for discovery whereas s 7 of the BBEA side-stepped that initial step by allowing inspection straight away (see paras 104 & 115).

(5) **(per Rhodzariah Bujang FCJ, majority)** It was extremely important to

note that in the United Kingdom ('UK'), unlike in Malaysia, the specific procedures relating to discovery in the Supreme Court of Judicature Act 1873 were enacted earlier than the UK's Bankers' Books Evidence Act 1879. Yet, the application of the former was not made subject to the latter. This showed that the disclosure of banking documents specified under the BBEA was meant to co-exist independently of the procedural requirements under the general civil procedure rules. Given that the BBEA was adopted almost wholesale from the UK legislation, this historical perspective of interpreting the BBEA was relevant. And it was even more so when in all the years before O 24 r 7A of the ROC came into being, there was no like provision in our civil procedural law which in any way impacted the power vested in the court by s 7 of the BBEA (see para 116).

(6) **(per Rhodzariah Bujang FCJ, majority)** Section 130(3) of the Evidence Act 1950 ('the EA') provided that 'No bank shall be compelled to produce its books in any legal proceedings to which it is not a party, except as provided by the law of evidence relating to bankers' books'. It was patently obvious that the phrase in italics referred to the BBEA because it was enacted earlier than the EA. This was further justification to hold that s 7 of the BBEA was not subject to O 24 r 7A of the ROC as was held by the Court of Appeal. The High Court rightly found that relevancy was the cornerstone of s 7 and of all other discovery applications and that based on Protasco's pleaded claim, the banking documents sought for were relevant to show the money trail to prove or disprove Protasco's allegation of the flow of funds to the respondents (see paras 108 & 118–119).

(7) **(per Rhodzariah Bujang FCJ, majority)** The definition of 'banker's book' under s 2 of the BBEA should be given a purposive interpretation with an 'updating' approach but in so doing, the meaning of 'any other book used in the ordinary business of a bank' in s 2 should be confined ejusdem generis to 'ledgers, day book, cash book and account book' – which was what 'banker's book' was defined under s 2 as including. So it could not include just any documents in the bank's possession. Recorded transactions between customer and banker would indeed qualify to be records or entries kept in the bank's ledger, day book, cash book and account book. 'Entry' was not defined in the BBEA but under s 34 of the EA, it referred to entries recorded in a book of account regularly kept in the course of a bank's business — which was one of the conditions of admissibility under the said section (see para 133).

(8) **(per Rhodzariah Bujang FCJ, majority)** The second leave question was answered in the affirmative only in so far as the words 'current practices in the ordinary business of a bank' related to technological advances in record-keeping and no other. The High Court judge rightly held that if

A the documents disclosed under the BBEA Orders came within the definition of 'banker's book' they were admissible as evidence, but if they did not, they were still admissible under the Evidence Act 1950 if the legal requirements for admission, particularly that of relevancy, had been satisfied (see para 134).

B

[Bahasa Malaysia summary

Perayu ('Protasco') mengemukakan tuntutan di Mahkamah Tinggi terhadap mantan pengarahnya (responden) dan sebuah syarikat di mana mereka mempunyai kepentingan peribadi ('PT ASU') atas ganti rugi yang timbul C daripada: (a) dakwaan komplot antara responden dan PT ASU untuk memfraud Protasco dan merugikan perniagaannya; dan (b) pelanggaran oleh responden terhadap tugas-tugas fidusiari mereka kepada Protasco. Dalam tuntutan tersebut, Protasco memohon untuk mendapatkan semula wang sebanyak USD27 juta dari defendan. Jumlah tersebut, menurutnya, adalah D jumlah responden dan PT ASU telah menipu Protasco dan mendapat keuntungan secara peribadi. Bagi mendapatkan keterangan jejak wang, Protasco memohon perintah di bawah Akta Buku Jurubank (Keterangan) 1949 ('ABJ') untuk memeriksa dan mengambil salinan catatan buku jurubank di pelbagai bank di mana responden, PT ASU dan entiti yang berkaitan atau E yang berhubungan mengendalikan akaun tersebut. Mahkamah Tinggi membenarkan permohonan yang dimohon. Apabila Protasco memohon untuk mengemukakan beberapa dokumen yang telah diperolehnya berdasarkan Perintah ABJ semasa perbicaraan, responden membantah pengemukaaannya atas beberapa alasan termasuklah: (i) bahawa Protasco telah F gagal mendapatkan perintah untuk penzahiran di bawah A 24 KKM dan tidak seharusnya menggunakan ABJ sebagai cara untuk mendapatkan penzahiran; (ii) beberapa dokumen yang dimohon atau diperolehi oleh Protasco tidak memenuhi definisi 'buku jurubank' di bawah ABJ dan oleh itu dikecualiakan dari didedahkan; and (iii) 'dokumen yang dipertikaikan' tidak dapat G dikemukakan sebagai keterangan kerana syarat bukti tertentu di bawah ABJ berkaitan dengan dokumen-dokumen tersebut belum dipatuhi. Responden berpendapat bahawa pendedahan dokumen tersebut yang berada di luar skop ABJ telah melanggar undang-undang kerahsiaan perbankan di bawah Akta Perkhidmatan Kewangan 2013. Mahkamah Rayuan mengakas keputusan H Mahkamah Tinggi dan berpendapat bahawa: (A) ABJ hanya bertujuan untuk memudahkan pembuktian salinan catatan dalam buku jurubank dan tidak dapat digunakan untuk menggantikan satu perintah penzahiran di bawah A 24 KKM; (B) bagi penzahiran dokumen khusus, Protasco seharusnya membuat permohonan untuk satu perintah penzahiran terlebih dahulu di bawah A 24 I KKM sebelum memohon Perintah ABJ; (C) kesemua prasyarat ABJ harus dipatuhi sebelum salinan catatan dalam buku bank dapat dikemukakan sebagai keterangan; dan (D) hakim Mahkamah Tinggi telah gagal mengenal pasti yang mana dokumen yang dipertikaikan adalah 'buku jurubank' dan yang mana adalah tidak. Protasco diberi kebenaran untuk merayu ke

Mahkamah Persekutuan berdasarkan persoalan undang-undang berikut: (1) sama ada s 7 ABJ memberi kuasa kepada mahkamah untuk membuat perintah penzahiran secara bebas dari A 24 KKM; dan (2) sama ada definisi 'buku jurubank' dalam ABJ harus mengambil kira amalan semasa perniagaan biasa sesebuah bank.

Diputuskan, dengan majoriti, mengetepikan keputusan Mahkamah Rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) **(oleh Hasnah Hashim HMP, menentang)** Sementara s 7 ABJ membenarkan pihak yang terlibat dalam sebarang prosiding undang-undang untuk memohon satu perintah untuk memeriksa dan mengambil salinan setiap catatan dalam buku bank untuk tujuan prosiding tersebut, ABJ tidak dapat digunapakai untuk tujuan penzahiran yang hanya dapat dilakukan bersesuaian dengan prosedur yang diperuntukkan di bawah A 24 KKM. Seksyen 7 ABJ tidak dapat digunakan sebagai usaha pintu belakang untuk mendapatkan keterangan dari bank di luar peraturan penzahiran yang diperuntukkan di bawah A 24 KKM. Protasco tidak membuat sebarang permohonan penzahiran di bawah A 24. Permohonannya dalam kedua-dua lampiran 307 dan 395 adalah untuk penzahiran dokumen tertentu dan oleh itu ia harus mematuhi kerangka undang-undang khusus untuk tujuan tersebut di bawah A 24. Protasco seharusnya membuktikan haknya terlebih dahulu untuk penzahiran di bawah A 24. Hakim Mahkamah Tinggi telah jelas terkhilaf dalam memutuskan bahawa s 7 ABJ membenarkan Protasco hak untuk penzahiran. Pandangan sedemikian adalah bertentangan dengan maksud dan tujuan ABJ dan kerangka kerahsiaan wajib di bawah ss 133(1) dan 134 Akta Perkhidmatan Kewangan 2013 (lihat perenggan 59, 62, 66, 71 & 73).

(2) **(oleh Hasnah Hashim HMP, menentang)** Seperti yang diputuskan oleh Mahkamah Rayuan, hakim Mahkamah Tinggi telah gagal mengenalpasti dokumen mana yang dipertikaikan tersebut adalah 'buku jurubank' atau sebaliknya. Dokumen-dokumen tersebut yang bukanlah salinan catatat dalam buku jurubank berada di luar skop ABJ dan harus dikecualikan. ABJ memerlukan Protasco untuk membuktikan dan mengesahkan dokumen yang dipertikaikan yang termasuk dalam skop ABJ. Dalam lampiran 307, Protasco memohon bukan hanya untuk memeriksa dan mengambil salinan kesemua catatan dalam buku bank berkenaan dengan akaun responden, tetapi juga untuk mendapatkan informasi dan dokumen yang dimiliki oleh mereka mengenai terdapat bukan pihak dalam tuntutan tersebut. Protasco juga memohon perintah agar diberi kebebasan untuk menggunakan segala informasi dan/atau dokumen yang diperoleh di bawah Perintah ABJ untuk tujuan sebarang prosiding undang-undang sama ada di Malaysia atau di tempat lain yang merupakan tambahan dan/atau berkaitan dengan prosiding semasa

sebagaimana yang dianggap sesuai oleh Protasco. Melalui lampiran 395, Protasco memohon perintah agar dokumen yang dipertikaikan diterima sebagai keterangan dan ditandakan sebagai eksibit dalam tuntutan berdasarkan ss 2, 3, 4, 5 dan/atau 6 ABJ walaupun terdapat dokumen yang tidak termasuk dalam definisi 'buku jurubank' seperti yang didefinisikan di bawah s 2 ABJ dan walaupun tidak satu pun dari dokumen-dokumen tersebut telah disahkan dan dibuktikan seperti yang diperuntukkan di bawah ss 4 dan 5 ABJ (lihat perenggan 60–64, 85 & 87).

(3) **(oleh Hasnah Hashim HMP, menentang)** Pandangan subjektif seorang hakim tentang apa yang harus dimasukkan sebagai 'buku jurubank' tidak dapat mengatasi apa yang ditentukan oleh undang-undang bertulis. Walaupun mahkamah di Singapura telah menerapkan pemahaman yang lebih luas tentang definisi di bawah kerangka buku banknya, pendekatan seperti itu tidak dapat diterapkan di Malaysia. Mahkamah mesti menafsirkan undang-undang secara bertujuan dan tidak mengambilkira perkataan yang tidak ada di sana. Tafsiran bertujuan dibenarkan hanya setakat yang dibenarkan oleh undang-undang. Ianya bukan untuk Mahkamah membuat perundangan tetapi hanya menafsirkan undang-undang sebagaimana yang dimaksudkan oleh Parlimen (lihat perenggan 82–83).]

(4) **(oleh Rhodzariah Bujang HMP, majoriti)** A 24 k 7A KKM hanya berkuatkuasa apabila KKM 012 digubal sedangkan ABJ telah digubal sejak tahun 1949 lagi berpandukan United Kingdom's Bankers' Books Evidence Act 1876. Memandangkan ABJ dan KKM wujud secara bersama pada perkara utama yang hampir sama, prinsip generalia specialibus non derogant digunapaki dan oleh kerana ABJ digubal untuk menguruskan dokumen perbankan secara khusus, maka seharusnya itulah undang-undang yang harus mengendalikannya dan bukan peruntukan umum dalam KKM. Walaupun ABJ wujud beberapa dekad sebelum KKM atau bahkan sebelum Peraturan Mahkamah Tinggi 1980, ia tidak secara automatik bermaksud bahawa s 7 ABJ adalah tertakluk kepada syarat-syarat prosedur penzahiran di bawah A 24 KKM. Dari cara A 24 digubal, ianya jelas bahawa pemeriksaan dokumen adalah kesan semula jadi dari perintah untuk penzahiran sedangkan s 7 ABJ melangkau langkah awal tersebut dengan membenarkan pemeriksaan segera (lihat perenggan 104 & 115).

(5) **(oleh Rhodzariah Bujang HMP, majoriti)** Ia adalah sangat penting untuk diambilkira bahawa di United Kingdom ('UK'), tidak seperti di Malaysia, prosedur khusus yang berkaitan dengan penzahiran dalam Supreme Court of Judicature Act 1873 digubal lebih awal daripada Bankers' Books Evidence Act 1879 di UK. Namun, permohonan yang pertama tidak tertakluk kepada yang kedua. Ini menunjukkan bahawa

pendedahan dokumen perbankan yang ditetapkan di bawah ABJ dibuat untuk wujud bersama secara bebas dari keperluan prosedur di bawah aturan prosedur am sivil. Memandangkan ABJ diterimapakai hampir kesemua perundangan UK, perspektif sejarah dalam menafsirkan ABJ adalah relevan. Dan lebih-lebih lagi apabila selama bertahun-tahun sebelum A 24 k 7A ROC dikuatkuasakan, tidak ada peruntukan yang serupa dalam undang-undang prosedur sivil kita yang mana memberikan kesan kuasa yang diberikan kepada Mahkamah oleh s 7 ABJ (lihat perenggan 116).

(6) **(oleh Rhodzariah Bujang HMP, majoriti)** Seksyen 130(3) Akta Keterangan 1950 ('AK') memperuntukkan bahawa 'Tiada bank boleh dipaksa mengemukakan bukunya dalam mana-mana prosiding undang-undang yang bank itu tidak menjadi pihak kepadanya, kecuali sebagaimana yang diperuntukkan oleh undang-undang keterangan berhubungan dengan buku jurubank'. Ianya sangat jelas bahawa frasa condong merujuk kepada ABJ kerana ia digubal lebih awal daripada AK. Ini merupakan justifikasi lanjut untuk memutuskan bahawa s 7 ABJ tidak tertakluk kepada A 24 k 7A KKM seperti yang diputuskan oleh Mahkamah Rayuan. Mahkamah Tinggi dengan tepat mendapati bahawa relevansi adalah landasan s 7 dan kesemua permohonan penzahiran lain dan bahawa berdasarkan tuntutan yang diplidkan Protasco, dokumen perbankan yang dimohon adalah relevan untuk menunjukkan jejak wang dalam membuktikan atau menyangkal dakwaan aliran kewangan Protasco kepada responden (lihat perenggan 108 & 118–119).

(7) **(oleh Rhodzariah Bujang HMP, majoriti)** Definisi 'buku jurubank' di bawah s 2 ABJ harus diberikan interpretasi bertujuan dengan pendekatan 'mengemas kini' tetapi dengan berbuat demikian, makna 'buku lain yang digunakan dalam perniagaan biasa bank' dalam s 2 harus dihadkan ejusdem generis kepada 'lejar, buku harian, buku tunai dan buku akaun' — yang mana termasuk 'buku jurubank' sebagaimana yang didefinisikan di bawah s 2. Oleh itu, ianya tidak termasuk sebarang dokumen yang berada dalam simpanan bank. Transaksi yang direkodkan antara pelanggan dan jurubank memang layak menjadi rekod atau catatan yang disimpan di dalam lejar, buku harian, buku tunai dan buku akaun bank. 'Catatan' tidak didefinisikan dalam ABJ tetapi di bawah s 34 AK, ini merujuk pada catatan yang dicatat dalam buku akaun yang biasanya disimpan dalam urusan bank — yang merupakan salah satu syarat pengemukaan di bawah seksyen tersebut (lihat perenggan 133).

(8) **(oleh Rhodzariah Bujang HMP, majoriti)** Persoalan kebenaran kedua telah dijawab secara afirmatif hanya setakatmana kata-kata 'amalan semasa dalam perniagaan biasa sesuatu bank' yang berkaitan dengan kemajuan teknologi dalam penyimpanan rekod dan bukan yang lain. Hakim Mahkamah Tinggi berpendapat bahawa sekiranya dokumen

yang didedahkan di bawah Perintah ABJ termasuk dalam definisi 'buku jurubank', dokumen tersebut dapat diterima sebagai keterangan, tetapi sekiranya ia tidak, dokumen tersebut masih boleh dikemukakan berdasarkan Akta Keterangan 1950 jika syarat perundangan untuk penerimaan, terutama yang relevan, telah dipenuhi (lihat perenggan 134).]

Cases referred to

Arnott v Hayes (1887) 36 Ch D 731, Ch D (refd)
Barker v Wilson [1980] 1 WLR 884, QBD (refd)
Chan Swee Leng v Hong Kong & Shanghai Banking Corporation Ltd [1996] 5 MLJ 133; [1996] 1 CLJ 812, HC (refd)
Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2010] 2 MLJ 312, FC (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1977] 2 MLJ 26 (refd)
Mulley v Manifold [1959] 103 CLR 341, HC (refd)
Norwich Pharmacal Co v Customs & Excise Commissioners [1974] AC 133 (refd)
Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 3 MLJ 625 (refd)
Pean Kar Fu v Malayan Banking Bhd (Toh Boon Pin, intervener) [2004] 5 MLJ 519; [2004] 5 CLJ 520, HC (refd)
R v Walsall Metropolitan Borough Council [2014] EWHC 1918 (Admin), FC (refd)
Shah & Co v State of Maharashtra [1967] AIR SC 1877, SC (refd)
Shun Kai Finance Co Ltd v Japan Leasing HK Ltd (No 2) [2001] 1 HKC 636, CA (refd)
Sim Siok Eng & Anor v Poh Hua Transport & Contractor Sdn Bhd [1980] 2 MLJ 72, SC (refd)
South Staffordshire Tramways Company v Ebbsmith [1895] 2 QB 669, CA (refd)
Teoh Peng Phe v Wan & Co [2001] 5 MLJ 149, HC (refd)
Waterhouse v Barker [1924] 2 KB 759, HC (refd)
Wee Soon Kim Anthony v UBS AG [2003] 5 LRC 171; [2003] 2 SLR(R) 91, CA (distd)
Williams v Summerfield [1972] 3 WLR 131, QBD (refd)
Yam Kong Seng v Yee Weng Kai [2014] 4 MLJ 478; [2014] 6 CLJ 285, FC (refd)

Legislation referred to

Banking Act 1979 [UK]
Bankers Books Evidence Act 1879 [UK] s 7
Bankers' Books (Evidence) Act 1949 ss 2, 3, 4, 5, 6, 7
Banking and Financial Institutions Act 1989 (repealed by Financial Services Act 2013)
Central Bank of Malaysia Act 2009
Companies Act 2016 ss 2, 4(1)

Courts of Judicature Act 1964 ss 4, 25(2)
Evidence Act 1950 ss 3, 7, 34, 90A, 90A(1), (2), 90B, 90C, 130(3), 133(1), (4)
Financial Services Act 2013 ss 2, 6, 133, 133(1), 134, 134(4), 145, Schedule 11
Interpretation Acts 1948 and 1967 s 17A
Limitation Act 1953 s 27(1)
Rules of Court 2012 O 2, O 24, O 24 rr 3, 3(1), 7, 7(1), 7A, 7A(1), (2), 8, 9, 10, 10(1), 11, 11(1), O 92 r 4, Form 38
Rules of the High Court 1980
Supreme Court of Judicature Act 1873 [UK]

Appeal from: Civil Appeal Nos W-02(IM)(NCC)-741–01 of 2019, W-02(IM)(NCC)-179–01 of 2019 and W-02(IM)(NCC)-715–01 of 2019 (Court of Appeal, Putrajaya)

S Sivaneindiren (Peter Skelchy and Joycelyn Teoh with him) (Cheah Teh & Su) for the appellants.
Malik Imtiaz Sarwar (Khoo Suk Chyi, Lim Yvonne and Ng Keng Yeng with him) (BH Lawrence & Co) for the respondents.

Hasnah Hashim FCJ (delivering dissenting judgment of the court):

INTRODUCTION

[1] The appeals concern the application and interpretation of the Bankers' Book (Evidence) Act 1949 ('the BBEA'), in particular whether the BBEA empowers a court to provide orders for discovery independently of O 24 of the Rules of Court 2012 ('the ROC').

[2] The appellant appealed against the decisions of the Court of Appeal given on 6 March 2020 in respect of the following:

(a) Civil Appeal No W-02(IM)(NCC)-179–01 of 2019 (Appeal 179);

(b) Civil Appeal No W-02(IM)(NCC)-715–04 of 2019 (Appeal 715); and

(c) Civil Appeal No W-02(IM)(NCC)-741–04 of 2019 (Appeal 741).

[3] Appeal 741, Appeal 179 and Appeal 715 ('COA appeals') emanated from two separate applications filed by the appellant in the High Court, pursuant to the BBEA, namely encls 307 and 395.

[4] For clarity, the parties will be referred to, like what they were referred to at the High Court as the plaintiff and the defendants respectively.

[5] Appeal 179 is the appeal filed by the defendants in respect of encl 307. Appeal 715 is the appeal filed by the defendants in respect of encl 395. Appeal 741 is the appeal filed by the plaintiff in respect of encl 395:

(a) Appeal 179 is against the whole of the High Court order dated 7 January 2019 which allowed the plaintiff's application under encl 307 for disclosure under the provisions of the BBEA;

(b) Appeal 715 is the second and third defendants' appeal against part of the High Court decision given on 15 March 2019 which dismissed the plaintiff's application (encl 395) for an order that all the documents previously disclosed under the orders granted pursuant to BBEA be admitted and/or taken as evidence and marked as exhibits; and

(c) Appeal 741 is the plaintiff's appeal against the whole of the High Court decision given on 15 March 2019 which dismissed the plaintiff's application (encl 395) for an order that all the documents previously disclosed under the order granted pursuant to the BBEA be admitted and/or taken as evidence and marked as exhibits.

[6] The Court of Appeal allowed the second and third defendants' appeals in Civil Appeal 179 with an order that encl 307 be dismissed and BBEA Order 2 be set aside. The second and third defendants' appeals in Appeal 715 was allowed with an order that the documents produced under BBEA Order 1 are inadmissible, and that all copies of those documents be expunged from the court file. The plaintiff's Appeal 741 is dismissed.

[7] On 25 August 2020, this court granted leave in respect of the following questions of law:

Question 1:

Whether s 7 of the BBEA empowers a court to provide orders for discovery independently of O 24 of the Rules of Court 2012; and

Question 2:

Whether the definition of 'banker's book' in s 2 of the BBEA is to be construed by taking into account current practices in the ordinary business of a bank.

THE FACTUAL AND PROCEDURAL BACKGROUND TO THIS APPEAL

[8] The facts are largely undisputed. On 22 September 2014, the plaintiff commenced an action in the High Court against the defendants. The plaintiff

is a public listed company listed on the Main Board of Bursa Securities Malaysia. Plaintiff's principal business is in construction, education, property development, road maintenance and other related business. The second and third defendants are the former directors of the plaintiff. In the main suit, the plaintiff is claiming for breach of fiduciary duty by the second and third defendants for causing the plaintiff to purchase shares in oil exploration rights in Indonesia from the first defendant. It is further alleged by the plaintiff that the second and third defendants had personal interest in the first defendant and failed to disclose their personal interest. The plaintiff seeks, among others, to recover the sum of USD27m from the second and third defendants.

[9] In its statement of claim ('SOC'), the plaintiff pleaded as follows:

(a) the defendants had induced the plaintiff to enter into the SPAs with full knowledge that the said transactions were to defraud the plaintiff;

(b) the defendants induced the plaintiff to make a payment of USD5m by fraudulent misrepresentations;

(c) the defendants had received payments via PT ASU and PT ASI as a result of the fraudulent act; and

(d) the defendants had concealed the fact of the whereabouts of the proceeds of their fraud from the plaintiff.

[10] On 12 December 2014, the plaintiff filed an ex parte application (encl 48) against CIMB Bank Bhd and CIMB Islamic Bank Bhd (CIMB) for an order to allow the plaintiff to inspect and take copies of all entries in the books of the banks and all documents in CIMB's possession in relation to bank accounts belonging to the first defendant and third parties, PT Anglo Slavic Indonesia (PT ASI), Fast Global Investments Ltd (Fast Global), PT Nusantara Rising Rich (PT NRR) and Telecity Investments Ltd (Telecity). encl 48 was filed pursuant to ss 6 and/or 7 of the BBEA and/or O 92 r 4 of the ROC.

[11] The basis of this application was a press statement dated 28 October 2014 which purportedly disclosed the flow of monies paid by the plaintiff pursuant to the SPAs, to PT ASU, PT NRR, Fast Global and Telecity.

[12] Enclosure 48 was allowed by the High Court on 25 June 2018 (BBEA Order 1) in the following terms:

(a) the plaintiff is at liberty to inspect and take copies of all entries in the books of CIMB relating to the bank accounts belonging to PT ASI, Fast Global, PT NRR, and Telecity. By this order, the plaintiff is given a blanket unlimited access to all information retained by the CIMB from the date the said bank account was opened with CIMB until the date of the BBEA Order 1;

(b) the plaintiff is at liberty to inspect and take copies of all documents in CIMB's possession in relation to each of the bank accounts belonging to PT ASI, Fast Global, PT NRR, and Telecity; giving the plaintiff unlimited access to all documents of any nature that were in CIMB's possession from the date the said bank account was opened until the date of the BBEA Order 1; and

(c) the plaintiff is at liberty to use any information obtained pursuant to BBEA Order 1 for the purposes of any legal proceedings ancillary to the suit as the appellant deems appropriate. Thus, the use of the material so disclosed was not limited to the proceedings in the High Court.

[13] There are no written grounds of judgment by the High Court judge giving reasons for his decision on encl 48.

[14] The plaintiff then filed another application against CIMB and Maybank Bhd on 18 October 2018 (encl 307) for an order to allow the plaintiff to, inter alia, inspect and take copies of all entries in the books of the banks as well as all documents in relation to bank accounts belonging to the defendants. Enclosure 307 was filed pursuant to ss 6 and 7 of the BBEA and/or O 92 r 4 of the ROC.

[15] The basis of encl 307 was that the documents and information obtained pursuant to BBEA Order 1 were material to the plaintiff's case. In its supporting affidavit, the plaintiff's then Director of Corporate Finance deposed that BBEA Order 1 revealed further documentation in relation to the bank accounts and entries of PT ASI, Fast Global, PT NRR and Telecity. And that such information showed that these entities were in essence controlled and/or connected to and/or related to the defendants.

[16] It is further contended by the plaintiff that the entries in the books of Maybank Bhd and CIMB relating to the defendants' accounts and the documentation relating to the inflow and outflow of funds from the said accounts are extremely material to a critical issue in the plaintiff's claim. The information and documentation sought by the order prayed for therein will reveal that the plaintiff's monies paid pursuant to the SPAs were eventually channeled into the defendants' accounts. The plaintiff, however, did not identify any of the documents sought as being 'banker's book' entries within the meaning of s 2 of the BBEA.

[17] The defendants opposed encl 307 and argued that the application was misconceived in law for it being, in substance, an application for discovery against CIMB and Maybank Bhd. The plaintiff ought to have filed instead an application under O 24 r 7A of the ROC 2012. The plaintiffs had not sought

discovery against the defendants in respect of the said matters. The provisions in the BBEA could not be relied on to circumvent the strictures on discovery under the ROC. Furthermore, the orders sought are too wide and all encompassing, and oppressive. It is the defendant's argument that encl 307 is in effect a fishing expedition and an abuse of the process of the High Court.

[18] The High Court allowed encl 307 on 7 January 2019. Following clarification sought by the defendants, the orders granted under BBEA Order 2 were limited to allowing the plaintiff to inspect and make copies of entries made between 28 December 2012 to 22 September 2014. The BBEA Order 2 was stayed by the Court of Appeal on 14 February 2019. However, by that time the banks concerned had produced copies of some documents. Since the BBEA Order 2 had been stayed pending the determination of the appeals by the Court of Appeal, the defendants sought for the trial to be adjourned pending the determination of the appeals. The learned High Court judge, however refused to adjourn and directed that the trial proceed. The plaintiff filed an application (encl 395) for the disputed documents to be admitted and/or taken as evidence and marked as exhibits pursuant to ss 2–6 of the BBEA and/or O 92 r 4 of the ROC 2012.

[19] The chronology of events have been articulately tabulated by the Court of Appeal through the written judgment of Kamaludin Md Said, COA judge which I reproduced below for reference and better appreciation of the facts as well as the applications before the courts:

Date	Particulars of proceedings
22 September 2014	The plaintiff commenced an action against the second and third defendants ('the suit'). The suit is pending before the High Court. The pleaded claim against the second and third defendants centres on their having, in breach of duties owed by them to the plaintiff, induced the plaintiff into entering two sales and purchase agreements ('the SPAs') with the first defendant, and for further inducing payments made pursuant to the SPAs for the benefit of the second and third defendants. This is contended on the footing that the second and third defendants had conspired with the first defendant to injure the plaintiff through fraud, thereby unlawfully interfering with the business of the plaintiff.

12 December 2014	The plaintiff filed encl 48, an ex parte application for discovery against CIMB Bank Bhd and/or CIMB Islamic Bank Bhd to allow the plaintiff to, inter alia, inspect and take copies of all entries in the books of the banks in relation to bank accounts belonging to the first defendant. Enclosure 48 was filed under s 6 and/or 7 of the BBEA and/or O 92 r 4 of the Rules of Court ('the ROC'). Enclosure 48 did not concern the second and third defendants. Enclosure 48 was allowed by the High Court on 25 June 2018 ('BBEA Order 1'). The High Court did not provide any written grounds of judgment.
18 October 2018	The plaintiff filed encl 307 for discovery against CIMB Bank Bhd and/or CIMB Islamic Bank Bhd and/or Maybank Bhd to allow the plaintiff to, inter alia, inspect and take copies of all entries in the books of the banks in relation to bank accounts belonging to the second and third defendants. Enclosure 307 was similarly filed pursuant to s 6 and/or 7 of the BBEA and/or O 92 r 4 of the ROC. In the supporting affidavit, the plaintiff's then Director of Corporate Finance deposed to a belief that: (a) 'the entries in the books of Maybank Bhd, CIMB Bank Bhd and/or CIMB Islamic Bank Bhd relating to the accounts (belonging to the second and third defendants) and the documentation relating to the inflow and outflow of funds from the said accounts are extremely material to a critical issue in the plaintiff's claim, which is the ownership of the first defendant and the end beneficiaries of the plaintiff's monies'; and (b) 'the information and documentation sought by the order prayed for herein will reveal that the plaintiff's monies paid (pursuant to the SPAs) were ultimately channeled back to the second and third defendants either through themselves or persons and/or entities connected and/or controlled and/or related to them'. The plaintiff did not identify any of the documents sought as being 'banker's book' within the meaning of s 2 of the BBEA. The second and third defendants opposed to encl 307 on the following basis: Enclosure 307 was misconceived in law for it being, in substance, an application for discovery. As such, the plaintiff ought to have filed the application under the ROC. The provisions in the BBEA could not be relied on to circumvent the strictures on discovery under the ROC; and

	In any event, the orders sought were wide and all encompassing, and oppressive by reason of their being so. Enclosure 307 was in effect a fishing expedition and was therefore tactical in nature. In the upshot, encl 307 was an abuse of the process of the High Court.
7 January 2019	The High Court allowed encl 307 ('BBEA Order 2'). Aggrieved, the second and third defendants filed Civil Appeal 179.
14 February 2019	BBEA Order 2 was stayed by the Court of Appeal. By which time the banks concerned had produced copies of some documents. On the first day of trial, the plaintiff sought to admit the documents ('the disputed documents') disclosed pursuant to BBEA Order 1 and BBEA Order 2 ('the BBEA orders') as evidence through its first witness, the then Director of Corporate Finance of the plaintiff. The plaintiff sought to do this without regard to the provisions of the BBEA. Pertinently, as produced before the High Court, the disputed documents were in two separate bundles and were unsorted, the said documents having merely been split into two categories — documents purportedly obtained under BBEA Order 1 marked as Bundle C1 and documents purportedly obtained under BBEA Order 2 marked as Bundle X1. The plaintiff did not consider the provisions of the BBEA, and the BBEA orders, as to what documents were admissible and the requirements for proving the same. The second and third defendants objected to this course of action on the basis that any attempt to introduce the disputed documents was necessarily circumscribed by the BBEA, the BBEA orders having to be read in light of the provisions of the legislation.
22 February 2019	The plaintiff filed encl 395 for the disputed documents to be admitted and/or taken as evidence and marked as exhibits pursuant to ss 2, 3, 4, 5 and/or 6 of the BBEA and/or O 92 r 4 of the ROC. The plaintiff's basis for encl 395 was as follows: The orders sought for in encl 395 'are consequential and/or are a proper consequence to' encls 48 and 307; The disputed documents 'are documents obtained pursuant to the provisions of the (BBEA)'; and The disputed documents 'are documents which form part of the records kept by the bank of transactions relating to the bank's business'. The second and third defendants opposed encl 395 on the following grounds:

	The disputed documents derived from sources that were not within the definition of 'banker's book' under s 2 of the BBEA. For that reason, the contents of the disputed documents could not be said to be 'entries' within the meaning of the BBEA. The broad categorisation of the disputed documents suggested by the second and third defendants can be found in Annexure A. This is explained further in para 38.2(c) below. Some of the disputed documents did not fall within the scope of the BBEA orders. This is explained further in para 38.3(a)(iii) below; and Critically, none of the disputed documents had been proven as required under the BBEA, specifically ss 4 and 5 of the BBEA.
15 March 2019	The High Court made an order for encl 395 to be 'dismissed without affecting the plaintiff's rights to adduce the relevant documents at the trial'. The learned judge however arrived at legal conclusions on the nature of the documents that were admissible under the BBEA, and the mode of proof for the same. The learned judge further concluded that any of the disputed documents which were later found to be wrongfully disclosed viz in the event of a successful appeal against encl 307, or which could not be proved under the BBEA could nevertheless be admitted under the Evidence Act 1950 ('the EA') since the plaintiff now had possession of the same.
18 November 2019	The trial is scheduled to resume.

THE HIGH COURT

[20] The learned High Court judge made the following findings:

(a) in respect of encl 307, the learned High Court judge was of the view that the BBEA provided an alternative and/or specific means of discovery in respect of banker's book. In determining whether to grant an order under s 7 of the BBEA, the ordinary principles of discovery would be applicable. There was no need to comply with ss 4 and 5 of the BBEA;

(b) in respect of encl 395, any documents that were improperly disclosed pursuant to an order granted under s 7 of the BBEA could nevertheless be admitted under the EA. There was no need to comply with ss 4 and 5 of the BBEA as s 3 of the Act must be understood in the context of modern banking practice and the provisions of the EA; and

(c) in respect of BBEA Order 2, there was no need necessity to comply with

both ss 4 and 5 of the BBEA as s 3 of the BBEA must be understood in the context of modern banking practice and the provisions of the EA. If a document falls within the meaning of a banker's book as defined under s 2 of the BBEA, all that was required was a certificate tendered pursuant to s 90A(2) of the EA. There was no need to comply with ss 4 and 5 of the BBEA. Any documents that were improperly disclosed pursuant to an order granted under s 7 of the BBEA could nevertheless be admitted under the EA.

THE COURT OF APPEAL

[21] The Court of Appeal took a different view from the High Court. In respect of encl 307, the Court of Appeal agreed with the defendants that the BBEA was legislated specifically to facilitate the proving of banking transactions through the admission of bankers' evidence. It is not intended to serve as an alternative means of discovery against banks. It follows that the ordinary principles of discovery would not be applicable in an application under s 7 of the BBEA. Order 24 of the ROC 2012 provides a specific legal framework for discovery in Malaysia. The learned High Court judge failed to specifically identify which of the disputed documents were or were not banker's book that is, disputed documents referred to documents purportedly obtained under BBEA Order 1 and documents purportedly obtained under BBEA Order 2. Documents such as company documents, memorandum or resolution for opening of bank account, memorandum or resolution for change of authorised signatory are not 'banker's book' as they are not permanently record transactions in the ordinary business of a bank.

[22] The Court of Appeal described in detail the different documents which can be categorised as banker's book. Miscellaneous internal documents used by the bank for example, specimen signature form, remittance application form, account opening application form, correspondence and documents evidencing the closing of account, are not 'banker's book' as they do not permanently record transactions in the ordinary course of business of a bank.

[23] Cheques and paying-in slips ,such as cheque deposit receipts, transaction slips are not 'banker's book' as they do not permanently record transactions in the ordinary business of a bank. They are either instructions or documents evidencing the said instructions prepared for customers' convenience.

[24] Bank statements are not 'banker's book' as they are created not for the purpose of permanently recording transactions in the ordinary business of a bank, but for customer's reference only.

[25] In respect of BBEA Order, the Court of Appeal opined that the plaintiff would not be permitted to adduce under the EA as the documents were improperly disclosed. Disputed documents should be excluded as there are outside the scope of the BBEA for not being copies of entries in banker's book within the meaning of s 2 of the BBEA. The plaintiff was required to prove and verify any of the disputed documents that fell within the permissible scope of the BBEA Orders under ss 4 and 5 of the BBEA. Failing that, the plaintiff was not permitted to rely on the disputed documents based on the provision of the EA.

[26] In respect of BBEA Order 2, the plaintiff is required to prove and verify any of the disputed documents that fall within the required scope of the BBEA Orders under both ss 4 and 5 of the BBEA. If the plaintiff fail to do so, the plaintiff is not permitted to rely on the disputed documents. Enclosure 395 ought to have been treated only as only applying to copies of documents produced under BBEA Order 1, and that all the documents produced under BBEA Order 1 ought to have been regarded as inadmissible under the BBEA on the ground that those documents were not admissible under the EA.

THE LEGISLATIVE FRAMEWORK

[27] The plaintiff's applications in the encls 307 and 395 were filed pursuant to the provisions of the BBEA and the inherent powers of the court under the ROC 2012. It is the plaintiff's argument that the provisions of the BBEA only provide a mechanism in which a document already obtained pursuant to a discovery application under O 24 r 7A of the ROC 2012 may be proved at trial.

[28] In response, learned counsel for the defendants argued that the applications filed by the plaintiff were misconceived and an abuse of process. The court did not have the jurisdiction to grant the orders prayed for by the plaintiff.

[29] It would perhaps be more convenient and appropriate in this case deal with the principles of law and discuss the legislations referred to by the parties in this appeal.

RULES OF COURT 2012

[30] Order 24 of the Rules of Court 2012 ('the ROC 2012') provides the legislative procedure for discovery in proceedings in court. The application for discovery is a pre-trial procedure before the matter is set down for trial. Under O 24 r 3 of the ROC 2012 the court may at any time order any party to a cause or matter to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power:

3(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

(a) the documents on which the party relies or will rely; and

(b) the documents which could —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

[31] The court under O 24 r 7 of the ROC 2012 can order for discovery of particular documents on the application of any party to a cause or matter may make an order requiring any other party to file an affidavit stating whether any document specified or described in the application or any class of document so specified or described is or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it:

(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 3.

(3) An application for an order under this rule shall be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application, and that it falls within one of the following descriptions:

(a) a document on which the party relies or will rely;

(b) a document which could:

(1) adversely affect his own case;

(2) adversely affect another party's case; or

(3) support another party's case; and

A (c) a document which may lead the party seeking discovery of it to a series of inquiry resulting in his obtaining information which may:

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

B (iii) support another party's case.

(4) An order under this rule shall not be made in any cause or matter in respect of any party before an order under rule 3 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary or desirable.

C

[32] If a party, in this case the plaintiff, is seeking discovery against a bank as a non-party, O 24 r 7A of the ROC 2012 would be the relevant provision. An application for discovery against a non-party is made is prior to the commencement of action.

D

[33] Order of discovery will only be granted if the court is satisfied that discovery is necessary for disposing fairly of the cause or matter or for saving costs. O 24 r 8 of the ROC 2012 provides that if the court is satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, E it may dismiss or adjourn the application and refuse to make such an order if in its opinion that discovery is not necessary.

BANKERS' BOOKS (EVIDENCE) ACT 1949 (REVISED – 1971) (ACT 33) ('THE BBEA')

F

[34] The intent and purpose of the BBEA is to preclude the need for a banker to attend legal proceedings to lead formal evidence on banker's book entries. A banker must by law maintain the secrecy of a customer's banking information unless otherwise exempted from doing so. When an order is made pursuant to G BBEA, it is subject to an implied undertaking that copies of entries in banker's book provided under the authority of an order of court are not to be used for collateral purpose. Any documents obtained under the cover of BBEA could only be used for the admission of banking documentary evidence into evidence.

H

[35] Section 2 of the BBEA defined bankers' books to include:

... any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank; ... (Emphasis added.)

I

[36] Subject to the provisions of the BBEA, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded (see s 3). Before the court can admit of a copy of a banker's book entry into evidence, a

bank officer must prove by either oral or affidavit evidence that the book was, at the time of the making of the entry, one of the ordinary books of the bank; that the entry was made in the usual and ordinary course of business and the book is in the custody or control of the bank:

> Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded.

[37] Section 4 of the BBEA reads:

> (1) A copy of an entry in a banker's book *shall not be received in evidence* under this Act unless it is first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
>
> (2) Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorized to take affidavits. (Emphasis added.)

[38] A copy of an entry in a banker's book shall not be received in evidence under the BBEA unless it is further proved that the copy has been examined with the original entry and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorised to take affidavits. Section 5 BBEA reads:

> (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct.
>
> (2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.

[39] Under s 6 of the Act an officer of a bank shall not, in any legal proceedings where the bank is not a party to the proceedings, be compelled to produce any banker's book the contents of which can be proved under this Act or even to appear as a witness to prove the matters, transactions and accounts t recorded, unless there is an order of a judge made for special cause:

> An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

[40] Section 7 of the BBEA provides that the court may order inspection of

any entries in a banker's book for any of the purposes of such proceedings:

(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court or Judge otherwise directs.

DECISION

[41] Discovery is a pre-trial process and governed by O 24 of the ROC 2012. Hence, any application for discovery must be in accordance to the procedure as provided under O 24 of the ROC 2012. The purpose of discovery is to provide the parties with all the relevant documentary evidence in each party's possession and to avoid trial by ambush or element of surprise. Menzies J in *Mulley v Manifold* [1959] 103 CLR 341 at p 345 described discovery as:

... a procedure directed towards obtaining a proper examination and determination of these issues — not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to train of inquiry which would, either advance a party's own case or damage that of his adversary.

[42] Discovery is thus a precursor to inspection; inspection is not a discovery exercise. A party who applies for discovery must provide a proper list of the discoverable and non-discoverable documents. Discoverable documents refer to documents, which do not contain any confidential information or privileged information available for production and inspection (see: Schedule 1, Part 2 of the List of Documents; Form 38 of the ROC 2012).

[43] Order 24 r Rules of the High Court 19807A of the ROC 2012 was introduced under the ROC 2012. Under the previous regime of the , any person who wish to seek or obtain discovery or disclosure of documents prior to the initiation of action could only do so under the principles established in the House of Lords' decision in *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133. No order discovery was issued against a person who is not a party to any proceedings, save at the trial and generally under pain of a *subpoena duces tecum* for the person in whose possession, custody or control the documents are with, to attend court as a witness and to produce such documents relevant to the proceedings. It was held that where an innocent third party has information relating to unlawful conduct, a court could compel them to assist the person suffering damage by giving them that information Lord Reid summarised the *Norwich Pharmacal* jurisdiction as follows:

... that if through no fault of his own a person gets mixed up in the tortious acts of

others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

[44] Order 24 r 7A of the ROC enables discovery in two circumstances. One, discovery is sought prior to the commencement of action and in the second scenario, discovery is sought after commencement of proceedings but against a non-party. The application for pre-action discovery is by means of an originating summons whereas in the latter, it is by means of a notice of application. O 24 r 7A of the ROC 2012 reads as follow:

(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.

(3) An originating summons under para (1) or a notice of application under para (2) shall be supported by an affidavit which shall:

(a) in the case of an originating summons under para (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to the subsequent proceedings in court; and

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or control.

(4) A copy of the supporting affidavit shall be served with the originating summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

(5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the court thinks it just to make such an order, and on such terms as it thinks just.

(6) An order for the discovery of documents may:

A

(a) be made conditional on the applicant giving security for the costs of the person against whom it is made or on such other terms, if any, as the court thinks just; and

(b) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.

[45] An applicant seeking discovery of documents before action must do the following:

(a) *state the material facts* pertaining to the intended proceedings;

(b) *state whether the person against whom the order is sought is likely to be a party* in the subsequent proceedings in the High Court;

(c) *specify or describe the documents* sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made; and

(d) *identify the persons* against whom the order is sought is likely to have or had.

(see: O 24 r 3 of the ROC 2012)

[46] In the exercise of its discretion under O 24 of the ROC 2012, the court must have regard to the provisions of rr 3, 7 or 7A that the court:

> ... if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[47] Order 24 of the ROC 2012 is a necessary medium to ensure fair disposal of the cause or matter or for the saving of costs. In exercising discretion whether to grant discovery of specified or described documents in the possession, custody or power of the applicant, the court must be satisfied that discovery of the documents before filing of action against the other party is indeed necessary. In *Shun Kai Finance Co Ltd v Japan Leasing HK Ltd (No 2)* [2001] 1 HKC 636 the Hong Kong Court of Appeal observed at p 641D–I that:

> So far as documents that are referred to in pleadings and affidavits are concerned, O 24 r 10 provides that any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings, affidavits or witness statements or experts' reports reference is made to any document requiring him to

produce that document for the inspection of the party giving the notice and to permit him to take copies. This rule which dates back to the last century was considered by the English Court of Appeal in *Quilter v Heatly* (1883) 23 Ch D 42. Its effect was summarized by Hobhouse J in *Eagle Star InsuranceCo Ltd v Arab Bank plc* (English High Court, 25 February 1991, unreported) (at pp 3–4). A pleading should be approached on the basis that it sets out in full all the documents which are referred to in that pleading. So if a party refers to documents in pleadings without their being set out in extenso, there is a right to require the pleading party to produce the document. ... A similar rule applies to exhibits to an affidavit. It has been held that these form as much part of the affidavit as if they had been actually annexed to and filed with it. See per Lord Herschell LC in *Re Hinchliffe* [1895] 1 Ch 117 at 12.

[48] The banking industry is regulated by a number of legislation in respect of its duty and obligation to safeguard the information of its customers and clients. Banking secrecy in Malaysia is governed by the Financial Services Act 2013 (Act 758) ('the FSA') which replaced the Banking and Financial Institutions Act 1989 ('the BAFIA'). It is mandatory under the FSA for the banks to protect the rights and interests of consumers of financial services and products (see: s 6 of the FSA). Section 133 of the FSA provides:

(1) No person who has access to any document or information relating to the affairs or account of any customer of a financial institution, including —

(a) the financial institution; or

(b) any person who is or has been a director, officer or agent of the financial institution,

shall disclose to another person any document or information relating to the affairs or account of any customer of the financial institution.

(2) Subsection (1) shall not apply to any document or information relating to the affairs or account of any customer of a financial institution —

(a) that is disclosed to the Bank, any officer of the Bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purposes of exercising any powers or functions of the Bank under this Act or the Central Bank of Malaysia Act 2009;

(b) that is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular customer of the financial institution to be ascertained from it; or

(c) that is at the time of disclosure is, or has already been made lawfully available to the public from any source other than the financial institution.

(3) No person who has any document or information which to his knowledge has been disclosed in contravention of subsection (1) shall disclose the same to any other person.

(4) Any person who contravenes subsection (1) or (3) commits an offence and shall,

on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both. (Emphasis added.)

[49] Section 133(1) of the FSA imposes a mandatory duty on any financial institution or any person who is or has been a director, officer or agent of the financial institution from disclosing to another person any document or information relating to the affairs or account of any customer of the financial institution. Disclosure of any banking document or information relating to the affairs or account of any customer of a financial institution can only be disclosed to the bank, any officer of the bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purposes of exercising any powers or functions of the bank under this Act or the Central Bank of Malaysia Act 2009 in the manner as provided by law.

[50] Any person who contravenes s 133 of the FSA commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both (see: s 134 of the FSA).

[51] Section 2 of the FSA defines 'book' as having the same meaning assigned to it in s 4(1) of the Companies Act 1965 (Act 125). The Act 125 has been repealed and replaced by Companies Act 2016 (Act 777). Section 2 of Act 777 defines 'book' *to include any register or other record of information and any accounts or accounting records, however compiled, recorded or stored, and also includes any documents.*

[52] Section 134(1) of the FSA allows disclosure of documents or information for such purpose or in such circumstances, any document or information relating to the affairs or account of its customer to such persons specified in the second column of that Schedule or relating to the affairs or account of its customer to any person where such disclosure is approved in writing by the bank as set out in the first column of Schedule 11. Section 134(4) of the FSA prohibits any person who receives any document or information relating to the affairs or account of a customer as permitted under to disclose such document or information to any other person.

[53] Where any document or information is likely to be disclosed in relation to a customer's account, the court may, on its own motion, or on the application of a party to the proceedings or the customer to which the document or information relates order that the proceedings be held *in camera* and in such case, the document or information shall be secret as between the court and the parties thereto, and no such party shall disclose such document or information to any other person and make such further orders as it may consider necessary to ensure the confidentiality of the customer information.

[54] Section 145 of the FSA provides that the secrecy requirements shall not apply for the purposes of the exercise of any of its powers or the performance of any of its functions by the bank under this Act or the Central Bank of Malaysia Act 2009 or for the purposes of prosecuting any person for any offence under any written law.

[55] The person who may apply for disclosure of bank documents under the FSA is generally a party to the proceedings or the customer to which the document or information relates. The secrecy of the documents however, must be maintained where it provides that the court may order that the proceedings be held *in camera* and no such party shall disclose such document or information to any other person and make such further orders as it may consider necessary to ensure the confidentiality of the customer information. The Legislature in its wisdom had seen it fit to ensure that strict banking secrecy is important to maintain the confidence of investors and customers in the Malaysian banking system.

[56] The Evidence Act 1950 (EA) contains specific provision with regards to the evidence involving banks. Relevant to the appeal before this court is s 130(3) of the EA:

> (3) No bank *shall be compelled to produce its books in any legal proceeding* to which it is not a party, *except as provided by the law of evidence relating to banker's books*.

[57] Designed to ensure that the banks and its clients' interests are protected in the event of legal proceedings, the BBEA in essence complements the specific procedure in respect of banks under the EA. Section 7 of the BBEA provides for an order to inspect and take copies of any entries in a banker's book for the purpose of any proceedings. It is not intended to be a discovery provision. The BBEA can only be invoked in the following circumstances, and that the right to discovery being an essential pre-requisite to the making of an order under the said provision. Kamaluddin Md Said JCA articulately explained in his grounds of judgment the purpose of the BBEA thus:

> [21] The underlying purpose of banker's book legislation is to preclude the need for a banker to attend legal proceedings to lead formal evidence on banker's book entries. A banker is obliged by law to maintain the secrecy of a customer's banking information save unless otherwise exempted from doing so. It is for that reason that when an order is made under BBEA, it is subject to an implied undertaking that copies of entries in banker's book provided under the authority of an order of court are not to be used for collateral purpose. Any documents obtained under the cover of BBEA could only be used for the admission of banking documentary evidence into evidence.
>
> [22] There is a specific legal framework for discovery in Malaysia, specifically O 24 of the ROC. Prior to the coming into force of the ROC, the Rules of the High Court 1980 ('RHC')similarly provided for discovery (though non-party discovery was

dealt with through the application of common law principles). It is in this context that consideration should be given to the existence of a specific legal framework for discovery in Malaysia, previously under the RHC, and now, the ROC. The ROC is an exhaustive code providing no room for the exercise of any common law principles of discovery. It was submitted that this carries with the following legal implications. If a party is seeking discovery against a bank as a non- party, that party must apply for discovery under O 24 r 7A(2) of the ROC. If this is prior to the commencement of action, then the application is moved under O 24 r 7A(1) of the ROC.

[23] As it is intended to facilitate the proving of copies of entries in banker's book, the BBEA can only be invoked in the following circumstances, the right to discovery being an essential pre-requisite to the making of an order:

(i) Where Party A has obtained discovery against Party B to the legal proceedings, and thereby determines that a bank has entries in banker's book that are relevant to the legal proceedings and, Party B is not in possession of a copy of said entry. In such an instance, Party A can seek inspection under s 7 of the BBEA and take a copy from the bank. That copy is to be admitted into evidence only upon fulfilment of ss 3, 4 and 5 of the BBEA as discussed above.

(ii) Where Party A has a copy of an entry in a banker's book but there is a dispute as to the said copy being admitted on the ground of its authenticity, then Party A is entitled to make an application under s 7 of the BBEA to inspect and take a copy from the bank. That copy is to be admitted into evidence only upon fulfilment of ss 3, 4 and 5 of the BBEA as discussed above.

[58] The contents of a banker's book must be proven under ss 3, 4 and 5 of the BBEA unless by order of a judge made for special cause. Learned counsel for defendants submitted that the provision of the BBEA reinforces s 130(3) of the EA, in so far as the underlying purpose of BBEA that is, to avoid the need for bankers to give formal evidence of banker's book entries.

[59] Section 7 of the BBEA enables a party to any legal proceedings to apply ex parte for an order to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. However, s 4 of the Act requires the applicant to identify the bankers' book it wishes to inspect. It is not meant to be a *carte blanche* for discovery without identifying the documents. As I have alluded to earlier ss 7 and 6 BBEA must be read in context with the EA as well as provisions of law concerning banking secrecy, the FSA. BBEA empowers the Court to make an order that a party be at liberty to inspect and take copies of any entries in a banker's book. However, BBEA cannot be invoked for the purpose of discovery. Discovery can only be by done in accordance to the procedure as provided under O 24 of the ROC 2012. Notwithstanding the provisions of BBEA, the general principles governing disclosure of documents in the possession, custody or power of the relevant banks and most importantly

relevant to the issues to be adjudicated, must be satisfied in accordance with the prevailing laws applicable.

[60] The plaintiff filed encl 307 pursuant to ss 6 and 7 BBEA and the inherent jurisdiction of the court under O 92 r 4 of the ROC 2012 not only to inspect and take copies of all the entries in the books of Maybank Bhd and CIMB and all documents in their possession relating to second and third defendants' accounts as well as documents, information of parties who are not even parties to the civil suit, for example, JF Apex Securities Bhd and Abamon Technology Sdn Bhd. The plaintiff also sought an order that they shall be at liberty to use any information and/or documents obtained as a result of the order for thepurposes of any legal proceedings in Malaysia or elsewhere which are ancillary and/or connected to the proceedings herein, as deemed appropriate by the plaintiff.

[61] The plaintiff filed encl 395 for the documents to be admitted and taken as evidence and to be marked as exhibits pursuant to ss 2, 3, 4, 5 and/or 6 of the BBEA and/or O 92 r 4 of the ROC. The basis for the application are as follows:

(a) the orders sought are consequential and/or are a proper consequence to' the BBEA Orders;

(b) the documents obtained pursuant to the provisions of the BBEA; and

(c) the documents are documents which form part of the records kept by the bank of transactions relating to the bank's business.

[62] The plaintiff did not file an application for discovery pursuant to O 24 of the ROC 2012 for discovery in connection with the matters raised in the press statement. Neither did the plaintiff filed an application to amend the SOC to reflect the matters of relevance said to have been brought to the attention of the plaintiff by the Press Statement. The documents sought to be discovered must be specified or sufficiently described in order it can be complied and produced by the defendant. The defendant must know the basis of the potential claim that is likely to be made against them based on the documents requested. The plaintiff must satisfy the court that the documents sought are relevant to an issue arising or likely to arise in the intended proceedings. More importantly the plaintiff must identify the person having possession, custody or power over the documents sought.

[63] In the present appeal plaintiff sought discovery of documents and information against non-parties through the provisions of BBEA and the inherent powers of the court. In essence they have asked the Maybank Bhd and CIMB to produce and disclose a wide range of banking transactions, information and documents of its customers who are non- parties to the

proceedings. The documents are as listed in the Annexures attached to the plaintiff's application:

ANNEXURE A

NO	DOCUMENT(S)	DATE
	PT ANGLO SLAVIC INDONESIA	
1.	PT Anglo Slavic Indonesia's company documents	–
2.	PT Anglo Slavic Indonesia — Memorandum for Opening of Bank Account	02.01.2013
3.	PT Anglo Slavic Indonesia — Account Opening Application Form for Business with CIMB Bank Berhad / CIMB Islamic Bank Berhad	23.01.2013
4.	PT Anglo Slavic Indonesia — Specimen Signature Form for CIMB Islamic Bank Account No.:1461-0001-2021-02 (OLD)	23.01.2013
5.	PT Anglo Slavic Indonesia — Memorandum for Change of Authorised Signatory for Current Account with CIMB Islamic Bank Berhad	27.01.2014
6.	PT Anglo Slavic Indonesia — Specimen Signature Form for CIMB Islamic Bank Account No.:1461-0001-2021-02 (OLD) signed by Ooi Kock Aun	-
7.	PT Anglo Slavic Indonesia — Remittance Application Form and Debit Transfer to Permata Bank in the sum of RM16,250,000.00	10.02.2014
8.	PT Anglo Slavic Indonesia's CIMB Islamic Bank Statement of Account.: 86-0028886-0 (NEW)	28.02.2014 – 31.12.2014
	TELECITY INVESTMENTS LIMITED	
9.	Telecity Investments Limited's company documents	-
10.	Telecity Investments Limited — Memorandum for Opening of Bank Account	10.05.2012
11.	Telecity Investments Limited — Account Opening Application Form for Business with CIMB Bank Berhad / CIMB Islamic Bank Berhad and other supporting documents	25.05.2012
12.	Telecity Investments Limited — Specimen Signature Form for CIMB Islamic Bank Account No.:1461-0001048-10-9	25.05.2012

13.	Telecity Investments Limited's Resolution — Change of Bank Signatory to On Yong Chieh	29.08.2012
14.	Telecity Investments Limited — Specimen Signature Form for CIMB Islamic Bank Account No.:1461-0001048-10-9	11.09.2012
15.	Abamon Technology Sdn Bhd's cheque No.367548 to Telecity Investments Limited for the sum of RM8,900,000.00	07.01.2013
16.	Telecity Investments Limited's cheque No.000032 to Tey Por Yee for the sum of RM191,715.00	15.01.2013
17.	Telecity Investments Limited's cheque No.000033 to Ooi Kock Aun for the sum of RM191,715.00	15.01.2013
18.	Telecity Investments Limited's cheque No.000053 to United Overseas Bank (Malaysia) Berhad for the sum of RM10,000,000.00	13.02.2013
19.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM4,005,000.00 to Kellminster Group Inc and Telecity Investments Limited's transfer of RM4,005,000.00 to Kellminster Group Inc [No.146108380953]	27.01.2014
20.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM4,600,000.00 to Nutox Limited and Telecity Investments Limited's transfer of RM4,600,000.00 to Nutox Limited [No.146108380951]	27.01.2014
21.	Telecity Investments Limited's cheque No.000368 to Zoomic Technology (M) Sdn Bhd for the sum of RM2,460,000.00	27.01.2014
22.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM4,005,000.00 to Fast Global Investments Limited and Telecity Investments Limited's transfer of RM4,005,000.00 to Fast Global Investments Limited [No.146128012014]	28.01.2014

23.	PT Anglo Slavic Utama's letter to CIMB Islamic Bank Berhad giving notice to transfer RM8,000,000.00 to Telecity Investments Limited and PT Anglo Slavic Utama's transfer of RM8,000,000.00 to Telecity Investments Limited [No.146104157533]	30.01.2014
24.	PT Anglo Slavic Utama's letter to CIMB Islamic Bank Berhad giving notice to transfer RM2,300,000.00 to Telecity Investments Limited and PT Anglo Slavic Utama's transfer of RM2,300,000.00 to Telecity Investments Limited [No.146108380932]	30.01.2014
25.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM7,300,000.00 to Active- Run Securities Limited and Telecity Investments Limited's transfer of RM7,300,000.00 to Active-Run Securities Limited [No.146130012014]	30.01.2014
26.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM11,000,000.00 to Active-Run Securities Limited and Telecity Investments Limited's transfer of RM11,000,000.00 to Active-Run Securities Limited [No.146106117127]	30.01.2014
27.	Telecity Investments Limited's transfer of RM509,430.00 to PT Green Pine's Indonesia Permata Bank Account No.:070-139-3848 [No.146106117728]	05.02.2014
28.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM1,000,000.00 to Nutox Limited and Telecity Investments Limited's transfer of RM1,000,000.00 to Nutox Limited [No.147112022014]	12.02.2014
29.	Telecity Investments Limited's cheque No.000387 to CIMB Bank Berhad for the sum of RM4,000,000.00 and Telecity Investments Limited's transfer of RM4,000,000.00 to RHB Investment Bank Bhd [Inst No.210914]	17.02.2014

30.	Nutox Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM6,000,000.00 to Telecity Investments Limited and Nutox Limited's transfer of RM6,000,000.00 to Telecity Investments Limited [No.147104311864]	24.02.2014
31.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM2,650,000.00 to Goodunited Limited and Telecity Investments Limited's transfer of RM2,650,000.00 to Goodunited Limited [No.147104311867]	24.02.2014
32.	Telecity Investments Limited's cheque No.000401 to CIMB Bank Berhad for the sum of RM3,500,000.00 and Telecity Investments Limited's transfer of RM3,500,000.00 to TA Securities Holdings Bhd [Inst No.210965]	24.02.2014
33.	Nutox Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM1,400,000.00 to Telecity Investments Limited and Nutox Limited's transfer of RM1,400,000.00 to Telecity Investments Limited [No.147104311864]	Limited and Nutox Limited's transfer of RM1,400,000.00 to Telecity Investments Limited [No.147104311864] 26.02.2014
34.	Telecity Investments Limited's cheque No.000429 to CIMB Bank Berhad for the sum of RM3,000,000.00 and Telecity Investments Limited's transfer of RM3,000,000.00 to KAF Investment Bank Bhd [Inst No.211218]	14.03.2014
35.	Telecity Investments Limited's cheque No.000432 to JF Apex Securities Berhad for the sum of RM190,352.20	20.03.2014
36.	Telecity Investments Limited's cheque No.000433 to JF Apex Securities Berhad for the sum of RM240,623.49	20.03.2014
37.	Telecity Investments Limited's cheque No.000434 to JF Apex Securities Berhad for the sum of RM95,754.33	20.03.2014

38.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM2,300,000.00 to Fast Global Investments Limited and Telecity Investments Limited's transfer of RM2,300,000.00 to Fast Global Investments Limited [No.147107685861]	24.03.2014
39.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM3,680,000.00 to Fast Global Investments Limited and Telecity Investments Limited's transfer of RM3,680,000.00 to Fast Global Investments Limited [No.147125032014]	25.03.2014
40.	Fast Global Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM1,600,000.00 to Telecity Investments Limited and Fast Global Investments Limited's transfer of RM1,600,000.00 to Telecity Investments Limited [No.147131032014]	31.03.2014
41.	Telecity Investments Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM2,650,000.00 to JF Apex Securities Berhad and Telecity Investments Limited's transfer of RM2,650,000.00 to JF Apex Securities Berhad [No.147128052014]	28.05.2014
42.	PT Anglo Slavic Utama's letter to CIMB Islamic Bank Berhad giving notice to transfer RM90,000.00 to Telecity Investments Limited and PT Anglo Slavic Utama's transfer of RM90,000.00 to Telecity Investments Limited [No.146117846601]	05.06.2014
43.	Telecity Investments Limited's cheque No.000531 to JF Apex Securities Berhad for the sum of RM20,000.00	10.06.2014
44.	Telecity Investments Limited's cheque No.000533 to JF Apex Securities Berhad for the sum of RM440,000.00	11.06.2014
45.	Telecity Investments Limited's cheque No.000534 to JF Apex Securities Berhad for the sum of RM185,000.00	12.06.2014

46.	Telecity Investments Limited's CIMB Islamic Bank Statement of Account.: 1461-0001048-10-9 (OLD) / 86- 0028734-4 (NEW)	31.08.2012 – 31.12.2014
	PT NUSANTARA RISING RICH	
47.	PT Nusantara Rising Rich's supporting company documents for Opening bank account	-
48.	PT Nusantara Rising Rich — Memorandum for Opening of Bank Account	10.05.2012
49.	PT Nusantara Rising Rich — Account Opening Application Form for Business with CIMB Bank Berhad / CIMB Islamic Bank Berhad	07.06.2012
50.	PT Nusantara Rising Rich — Specimen Signature Form for CIMB Islamic Bank Account No.:1461-0001060-10-8	-
51.	PT Nusantara Rising Rich's cheque No.:000029 to JF Apex Securities Berhad for the sum of RM1,300,000.00	28.12.2012
52.	PT Anglo Slavic Utama's cheque No.:000001 to PT Nusantara Rising Rich for the sum of RM1,300,000.00	02.01.2013
53.	PT Anglo Slavic Utama's cheque No.:000023 to PT Nusantara Rising Rich for the sum of RM792,000.00	29.01.2013
54.	PT Nusantara Rising Rich's cheque No.000030 to CIMB Investment Bank Berhad for the sum of RM792,000.00	29.01.2013
55.	PT Anglo Slavic Utama's cheque No.:000026 to PT Nusantara Rising Rich for the sum of RM2,050,000.00	04.02.2013
56.	PT Nusantara Rising Rich's cheque No.000054 to CIMB Investment Bank Berhad for the sum of RM2,050,000.00	06.02.2013
57.	PT Anglo Slavic Utama's letter to CIMB Islamic Bank Berhad giving notice to transfer RM1,500,000.00 to PT Nusantara Rising Rich and PT Anglo Slavic Utama's transfer of RM1,500,000.00 to PT Nusantara Rising Rich [No.14108381073]	06.02.2013

58.	PT Goldchild Integritas Abadi's cheque No.000004 to PT Nusantara Rising Rich for the sum of RM4,980,000.00	06.02.2013
59.	PT Nusantara Rising Rich's cheque No.000055 to Telecity Investments Limited for the sum of RM4,980,000.00	07.02.2013
60.	PT Anglo Slavic Utama's letter to CIMB Islamic Bank Berhad giving notice to transfer RM3,000,000.00 to PT Nusantara Rising Rich and PT Anglo Slavic Utama's transfer of RM3,000,000.00 to PT Nusantara Rising Rich [No.146106117088]	30.01.2014
61.	PT Anglo Slavic Utama's letter to CIMB Islamic Bank Berhad giving notice to transfer RM5,000,000.00 to PT Nusantara Rising Rich and PT Anglo Slavic Utama's transfer of RM5,000,000.00 to PT Nusantara Rising Rich [No.146130012014]	30.01.2014
62.	PT Nusantara Rising Rich's letter to CIMB Islamic Bank Berhad giving notice to transfer RM5,000,000.00 to Telecity Investments Limited and PT Nusantara Rising Rich's transfer of RM5,000,000.00 to Telecity Investments Limited [No.146130012014]	30.01.2014
63.	PT Nusantara Rising Rich's letter to CIMB Islamic Bank Berhad giving notice to transfer RM3,000,000.00 to Telecity Investments Limited and PT Nusantara Rising Rich's transfer of RM3,000,000.00 to Telecity Investments Limited [No.146106117091]	30.01.2014
64.	PT Nusantara Rising Rich's CIMB Islamic Bank Statement of Account.: 1461-0001060-10-8 (OLD) / 86-0028746-3 (NEW)	31.08.2012 – 31.12.2014
	FAST GLOBAL INVESTMENTS	
65.	Fast Global Investments Limited's company documents and supporting documents for Opening bank account	-
66.	Fast Global Investments Limited — Resolution for Opening of Bank Account	10.05.2012

67.	Fast Global Investments Limited — Account Opening Application Form for Business with CIMB Bank Berhad / CIMB Islamic Bank Berhad	25.05.2012
68.	Fast Global Investments Limited — Account Opening Application Form for Business with CIMB Bank Berhad / CIMB Islamic Bank Berhad	25.05.2012
69.	PT Anglo Slavic Utama's cheque No.:000011 to Fast Global Investments Limited for the sum of RM1,600,000.00	04.01.2013
70.	PT Anglo Slavic Utama's cheque No.:000013 to Fast Global Investments Limited for the sum of RM2,000,000.00	09.01.2013
71.	Fast Global Investments Limited's cheque No.:000036 to CIMB Investment Bank Berhad for the sum of RM1,000,000.00	09.01.2013
72.	Fast Global Investments Limited's cheque No.:000038 to Jason Minos Anak Peter for the sum of RM22,720.00	10.01.2013
73.	Fast Global Investments Limited's cheque No.:000040 to Lim Chye Guan for the sum of RM47,040.00	10.01.2013
74.	Fast Global Investments Limited's cheque No.:000041 to Ooi Kock Aun for the sum of RM13,440.00	11.01.2013
75.	Fast Global Investments Limited's cheque No.:000042 to CIMB Investment Bank Berhad for the sum of RM1,500,000.00	11.01.2013
76.	Fast Global Investments Limited's cheque No.:000043 to Faizatul Ikmi Binti Abdul Razak for the sum of RM500,000.00	21.01.2013
77.	Fast Global Investments Limited's cheque No.:000044 to CIMB Bank Investment Berhad for the sum of RM1,680,000.00	25.01.2013
78.	PT Anglo Slavic Utama's cheque No.:000020 to Fast Global Investments Limited for the sum of RM1,300,000.00	25.01.2013
79.	PT Anglo Slavic Utama's cheque No.:000021 to Fast Global Investments Limited for the sum of RM2,040,000.00	29.01.2013

80.	Fast Global Investments Limited's cheque No.:000045 to CIMB Bank Investment Berhad for the sum of RM2,040,000.00	29.01.2013
81.	PT Anglo Slavic Utama's letter to CIMB Islamic Bank Berhad giving notice to transfer RM2,928,000.00 to Fast Global Investment Limited and PT Anglo Slavic Utama's transfer of RM2,928,000.00 to Fast Global Investments Limited [No.:146108381074]	06.02.2013
82.	Fast Global Investment Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM6,080,000.00 to Nutox Limited and Fast Global Investment Limited's transfer of RM6,080,000.00 to Nutox Limited [No.:146104300269]	06.02.2013
83.	Fast Global Investments Limited's cheque No.000046 to Telecity Investments Limited for the sum of RM5,020,000.00 07.02.2013 84. Fast Global Investment Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM3,500,000.00 to Telecity Investments Limited and Fast Global Investment Limited's transfer of RM3,500,000.00 to Telecity Investments Limited [No.:146108376826]	18.02.2013
84.	Fast Global Investment Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM3,500,000.00 to Telecity Investments Limited and Fast Global Investment Limited's transfer of RM3,500,000.00 to Telecity Investments Limited [No.:146108376826]	18.02.2013
85.	Fast Global Investments Limited's cheque No.000047 to CIMB Investment Bank Berhad for the sum of RM200,000.00	20.02.2013
86.	Fast Global Investment Limited's letter to CIMB Islamic Bank Berhad giving notice to transfer RM1,500,000.00 to PT Anglo Slavic Utama and Fast Global Investment Limited's transfer of RM1,500,000.00 to PT Anglo Slavic Utama [No.:146127022013]	27.02.2013

87.	Fast Global Investments Limited's cheque No.000052 to CIMB Investment Bank Berhad for the sum of RM400,000.00	28.03.2013
88.	Fast Global Investments Limited's CIMB Islamic Bank Statement of Account.: 1461-0001049-10-1 (OLD) / 86- 0028735-6 (NEW)	31.08.2012 – 31.12.2014

ANNEXURE B

NO	DOCUMENT(S)	DATE
1.	Tey Por Yee's Maybank Berhad Statement of Account from December 2012 to August 2014	–
2.	Image extracted from the Central Image Archieve of Sistem Penjelasan Informasi Cek - Tey Por Yee's Maybank Berhad cheque to Kenanga Investment Bank Berhad in the sum of RM2,200,000.00	05.08.2013
3.	Mikhail Euro Associates Sdn Bhd's Maybank Berhad cheque to Tey Por Yee in the sum of RM2,600,000.00	07.01.2013
4.	Image extracted from the Central Image Archieve of Sistem Penjelasan Informasi Cek — Telecity Investment Limited's CIMB Islamic Bank Berhad cheque to Tey Por Yee in the sum of RM191,715.00	16.01.2013
5.	Abamon Technology's Maybank Berhad Statement of Account from December 2012 to August 2014	–
6.	Document evidencing the closing of Abamon Technology Sdn Bhd's Maybank Berhad bank account	
7.	PT Anglo Slavic Utama's CIMB Islamic Bank Berhad's cheque to Abamon Technology Sdn Bhd in the sum of RM4,600,000.00	31.12.2012
8.	PT Anglo Slavic Utama's CIMB Islamic Bank Berhad's cheque to Abamon Technology Sdn Bhd in the sum of RM4,300,000.00	28.12.2012

9.	Image extracted from the Central Image Archieve of Sistem Penjelasan Informasi Cek — Abamon Technology Sdn Bhd's CIMB Islamic Bank Berhad cheque to Telecity Investment Limited in the sum of RM8,900,000.00	07.01.2013

[64] The plaintiff filed encl 395 for an order that the disputed documents be admitted and/or taken as evidence and marked as exhibits pursuant to ss 2, 3, 4, 5 and/or 6 of the BBEA and/or O 92 r 4 of the ROC. The basis for the application was that the orders sought for are consequential and/or are a proper consequence to encl 48 and encl 307. The documents listed were derived from sources that does not fall within the definition of 'banker's book' as defined under s 2 of the BBEA and none of the said documents had been verified and proven as required under the BBEA, specifically pursuant to ss 4 and 5 of the BBEA.

[65] The High Court dismissed encl 395 without affecting the plaintiff's rights to adduce the relevant documents at the trial. Even though he had dismissed the application the learned Judge concluded that on the nature of the documents that were admissible under the BBEA, and the mode of proof for the same. He further concluded that any of the disputed documents which were later found to be wrongfully disclosed vis in the event of a successful appeal against encl 307, or which could not be proved under the BBEA could nevertheless be admitted under Evidence Act 1950 ('EA') since the plaintiff now had possession of the same. His reasons are as follows:

> [49] In my judgment, the views expressed in the passage quoted above no longer reflect the general rules governing discovery. The principal test is one of relevancy, and as explained *ante*, the plaintiff's assertions must be assumed to be true in assessing the relevance of the information sought to be obtained by the order of discovery or inspection. Accordingly, while the decision in *South Staffordshire Tramways v Ebbsmith* may be properly cited for the general rule that the principles governing discovery apply in determining whether or not an order for inspection ought to be granted under the Bankers' Books (Evidence) Act 1949, it cannot be relied upon for the purposes of determining what those discovery principles are, for much water has flowed under the bridge since 1895.
>
> [50] Applying the test of relevancy to the facts of the application in encl. 307, I was of the view that the inspection of the banker's books ought to be allowed, as it would go towards establishing the plaintiff's case against the second and third defendants. The information obtained from an inspection of the accounts and other books held by the banks would establish the money trail, and would determine whether or not the money paid by the plaintiff under the share acquisition had found its way back into accounts controlled by the second and third defendants

[66] The learned High Court judge concluded that s 7 of the BBEA enables the plaintiff the right to discovery. With greatest of respect, the learned judge, simply chose to disregard the intent and purpose of BBEA as well the mandatory confidentiality framework under the ss 133(1) and 134 of the FSA.

[67] The learned High Court judge had misdirected himself when he concluded that any of the documents later found to be wrongfully disclosed which could not be proved under the BBEA, could nevertheless be admitted under EA on the basis that the plaintiff now had in their possession the documents notwithstanding that under BBEA Order 2 the plaintiff can only inspect and make copies of the entries in banker's books. He had disregarded the underlying legislative intent of the BBEA and considered the other provisions in the BBEA repugnant.

[68] The BBEA is not intended to give power of discovery to the High Court. Arulanandom J explained the object of the Act in *Goh Hooi Yin v Lim Teong Ghee & Ors* [1977] 2 MLJ 26 at p 28:

> Section 7(1) of the Bankers' Books (Evidence) Act, 1949 is in *pari materia* to the English Act. *The main object of the provisions of the Act is to enable evidence to be procured and given and to relieve bankers from the necessity of attending and producing their books. They do not give any new power of discovery or alter the principles of law or the practice with regard to discovery.*
>
> In *Parnell (formerly O'Shea) v Wood & Anor* [1892] 17 PD p 137 the court of Appeal in upholding the trial judge's refusal to allow inspection of pass books of a party had this said by Kay LJ:
>
> > It is necessary to proceed with caution in acting on s 7 of the Bankers' Books Evidence Act, as was observed by Bowen LJ, in Arnott v Hayes. According to the appellants, if a person engaged in litigation has a banking account, his adversary is entitled to inspect that account to see whether he can find anything that will help him. The Bankers' Books Evidence Act has nothing to do with any question of the kind. Section 7 of the Act gives a certain power of inspecting bankers' books if the judge thinks fit to order it, but to suppose that it meant to authorize a roving inspection of them is absurd. The main object of the Act was this: before the Act the only way of making bankers' books evidence was to have them produced at the trial, and to examine the clerk who kept them. Bowen LJ, in Arnott v. Hayes, has pointed out the course of proceeding. The books which were wanted were generally books which were in daily use, and the statute was mainly passed for the purpose of relieving bankers from this inconvenience by allowing them to make copies and verify them. The Act does indeed provide by s 7 for allowing inspection where a judge thinks proper to order it, but a case must be made showing that such inspection is proper. I never saw a more extraordinary application than the present. Pass books are produced which are no doubt copied from the banker's books, but the party producing them seals up parts which she swears not to be relevant. According to the law of discovery, the opposite party has no right to look at the parts so sealed up. The present

application is an attempt to get behind the affidavit of the party producing the documents. There is nothing to show that the affidavit is untrue, but the applicants wish to evade it by obtaining inspection of the books from which the pass books were made out. (Emphasis added.)

[69] Jeffrey Tan J (as His Lordship then was) explained the intent and purpose of BBEA in *Pean Kar Fu v Malayan Banking Bhd (Toh Boon Pin, intervener)* [2004] 5 MLJ 519; [2004] 5 CLJ 520:

As said, s 7 is to enable parties, who would otherwise not be able to do so, *to inspect the books of the bank and take copies of them.* Section 7 is to assist discovery. Section 7 *has not altered the principles of law or practice with regard to discovery which is the pre-trial device to obtain facts and information about the case from the other party in order to assist the party's preparation for trial.* Section 7 empowers the court to order the inspection and the taking of copies of entries in a bankers' book in the pre-trial discovery process. But that is not to say that s 7 has brought about a right to bring a separate action against a bank to reveal its book entries, and or to take the discovery process away from the court before whom the legal proceeding is being held or taken. Section 7 has not provided an alternative method of discovery. Discovery remains in the domain of the trial court. (Emphasis added.)

[70] The Court of Appeal through the judgment of Kamaluddin Md Said JCA explained with acuity that the plaintiff's applications in encls 307 and 395 were specific discovery for documents and as such must adhere to the existence of a specific legal framework for discovery under the ROC:

[80] The ROC is an exhaustive code providing no room for the exercise of any common law principles of discovery. The bank and the defendants are non party to the discovery for the banks' book. In the case where the third party is involved, the plaintiff must apply for discovery under O 24 r 7A of the ROC. If the application is made after the commencement of action, the application is moved under O 24 r 7A(1). The BBEA is only intended to facilitate the proving of copies of entries in banker's book, therefore, the right to discovery is an essential pre-requisite to the making of an order. Section 7 of the BBEA has to be understood in the context of s 130(3) of the EA and s 6 of the BBEA, as well as provisions of law concerning banking secrecy. The underlying purpose of BBEA is concerned to avoid the need for bankers to give formal evidence of banker's book entries.

[81] In another context, although provisions in BBEA have been used for asset-tracing exercises, they are generally underutilised, and there is limited English law interpreting them. Notwithstanding that, some broad parameters (mainly from the discovery rules) circumscribe the scope of relief: First, the documents sought must be material to the proceedings. A court will not entertain a fishing expedition, and if the relevance of documents is unclear. Second, third parties should not be prejudiced here, typically a bank or a customer. Further, because the rules of discovery apply to applications for banker's book, in *Bhimji v Chatwani (No 2)* [1992] 1 WLR 1158, it was held that by parity of reasoning' documents disclosed under banker's book provisions are subject to the usual implied undertaking that

documents obtained are not to be used for purposes outside of the litigation. Courts take it so seriously that a person may be cited for contempt if an undertaking made to it is breached. For clarification purposes say a litigant, to whom documents are produced, undertakes to the court not to use such documents for any other purpose other than those of the proceedings in which they are disclosed, subsequently contravenes that undertaking, the party who acts in breach of the undertaking should be prepared to face the wrath of the court. These appear to be the key applicable principles.

[71] I have no hesitation in concluding that the interpretation by the Court of Appeal is to be preferred, for the following reasons. The legislative intent of the BBEA is to make the proof of banking transactions easier and to facilitate the production of banker's book evidence. Section 7 of the BBEA and s 130(3) of the EA, as well as a banker's statutory duty to secrecy under the FSA be considered as being in pari materia. BBEA is a legislation enacted specifically for banks as a bank representative may have to produce voluminous physical bank documents in court may be of an inconvenience that may affect the bank's daily operations. Therefore, for convenience, attested copies need only be produced and a bank is not compellable to attend as witness to prove the matters recorded in its books without special cause. Section 7 of the English Bankers' Books Evidence Act, which is the equivalent to Malaysian s 7 of the BBEA has developed into a form of discovery procedure on its own. This is not the case in the Malaysian context. Section 7 of the BBEA cannot be utilised as a backdoor attempt at obtaining evidence from a bank outside of the disclosure rules provided under O 24 of the ROC 2012.

[72] The BBEA provides an exception to the general framework of the EA whereby under s 130(3) of the EA provides that no bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by the law of evidence relating to banker's book. A banker is not to be summoned merely to produce banker's book. This is reinforced by provisions of the BBEA itself. In other words, the law of evidence relating to banker's book is provided for under the specific framework of the BBEA.

[73] It is clear that the plaintiff's applications in both encls 307 and 395 were specific discovery for documents which must adhere to the existence of a specific legal framework for discovery under the ROC. The plaintiff ought to have first established its right to discovery under O 24 of the ROC 2012.

[74] The definition of 'bankers' books' in the English BBEA originally was as follows:

bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank

The above definition is similar to s 2 of the BBEA:

> banker's book' includes any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank

[75] Cotton LJ in *Arnott v Hayes* (1887) 36 Ch D 731 at p 737 explained the objective of the English Act:

> The main object of the section is to enable evidence to be given at the trial. I do not say that it cannot be used for any other purpose; but in the present case the object sought is to obtain evidence for the trial. If any attempt were made to use the information thus obtained for purposes other than those of the action the Court would interfere. *Now, what is the object of this Act? It takes away the power of summoning a banker to produce his books at the trial. So far it is an act for the relief of bankers - it relieves them from the great inconvenience of having to attend at the trial and bring with them books which are in daily use in their business. Then it enables copies of the entries to be given in evidence. How can the suitor know what entries are wanted? Only by examination of the books, and though this order gives a wider power of inspection than a suitor had before, it is an inspection for the very purpose of the Act. It was urged, and I was at first struck by the observation, that this is making the Act give a power of discovery. But that is a fallacy. This is not giving the Plaintiff discovery from the Defendant to assist the Plaintiff's case, but giving him a power of examination for the purpose of ascertaining what copies he will require for the purpose of being put in evidence.* (Emphasis added.)

[76] The English BBEA was subsequently amended in 1982. The definition of 'bankers' books' vide the Banking Act 1979 reads as follows:

> bankers' books' include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism

[77] The definition of 'bankers book' under the Malaysian BBEA remains the same and must be read together with s 90A of the EA. Section 90A(1) of the EA provides:

> inter alia, a document produced by a computer, or a statement contained in suchdocument, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

[78] The interpretation of the word 'document' allows an updated interpretation of 'banker's book' to include documents produced by computers and statements. The word 'computer' is defined under s 3 of the EA as:

> an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic,

storage and display functions, and includes any data storage facility orcommunications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriteror typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility.

[79] The court, however, is not at liberty to include any such document under the BBEA. The document, even if it is a document or statement within the meaning of s 90A of the EA and must be a copy of an entry in a banker's book. The mode utilised by a bank to permanently record transactions relating to the business of that institution. 'Document' must be construed *ejusdem generis* with 'ledger, day book, cash book and account book.

[80] Where the permanent record is a computer document, the admitting of that document under the BBEA must not only fulfil the requirements of ss 3, 4 and 5, BBEA, it must also comply with the certification requirements under s 90A. This approach would negate any inconsistency between the BBEA and the EA. Any other reading would not only lead to a conflict between the two statutes, but also be repugnant to the BBEA and render it redundant.

[81] It must be borne in mind that a court is not at liberty to ignore the precise and clear language of the BBEA, or its underlying purpose, to provide an updated interpretation of the definition of 'banker's book'. Such an exercise is permitted only to the extent the law allows. As explained above, s 90A of the EA allows for that updating within the scope permitted by that provision.

[82] Judges must be cautious when applying the definition to the current banking practice. The subjective views of a judge on what ought to be included as a 'banker's book' cannot prevail over what has been prescribed by the written laws. The Singapore courts have adopted a broader understanding of the definition under its banker's books framework. Care has to be exercised, however, in applying decisions from that jurisdiction.

[83] Learned counsel for the appellant suggested that this court should consider the approach taken by the Singapore courts as to the application of the definitionof 'banker's books'. I am of the view that the approach taken by the Singapore court cannot be adopted in Malaysia. The court must interpret legislation purposively and hence cannot import words that are not there. The purposive interpretation is permitted only to the extent as the law allows. Time and time again the courts are reminded that the courts do not legislate but merely interpret the law as intended by Parliament.

[84] The Singapore Court of Appeal in *Wee Soon Kim Anthony v UBS AG*

A [2003] 2 SLR(R) 91 said:

> [19] We must also stress that Part IV does not expand a party's right of discovery. Whether a party may inspect the bank account of another person is subject to his right to discovery. In *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, the Court of Appeal, in considering the equivalent provisions in the English Bankers' Books Evidence Act, 1879, held that an order for inspection would only be made if the litigant was entitled to the information under his right to discovery. Similarly, in *R v Bono* [1913] 29 TLR 635, the court refused to grant to a defendant in a libel action an order to inspect the plaintiff's bank account on the ground that the 1879 Act was not intended to accord to a litigant greater facilities for discovery than what would be allowed under normal discovery principle

[85] With respect, I have found the greatest difficulty in accepting the learned High Court judge's interpretation of the BBEA. I agree with the Court of Appeal that the learned High Court judge failed to specifically identify which of the disputed documents were or were not 'banker's book'. Documents such as company documents, memorandum or resolution for opening of bank account, memorandum or resolution for change of authorised signatory) are not 'banker's book' as they do not permanently record transactions in the ordinary business of a bank. Miscellaneous internal documents used by the bank (such as specimen signature form, remittance application form, account opening application form, correspondence and documents evidencing the closing of account) are also not 'banker's book' as they do not permanently record transactions in the ordinary business of a bank.

[86] Cheques and paying-in slips such as cheque deposit receipts, transaction slips are not 'banker's book' as they do not permanently record transactions in the ordinary business of a bank. They are either instructions or documents evidencing the said instructions which are prepared for the purposes of customers' convenience. Bank statements are not 'banker's book' as they are created not for the purpose of permanently recording transactions in the ordinary business of a bank, but for customer's reference only.

[87] Disputed documents outside the scope of the BBEA for not being copies of entries in banker's book should be excluded. The plaintiff is required to prove and verify any of the disputed documents that fall within the scope of the BBEA.

[88] The learned High Court judge's interpretation of the law was therefore plainly wrong and the Court of Appeal was justified in interfering in order to prevent a miscarriage of justice. Of great concern fraud was not pleaded and neither was there any attempt to amend the pleadings. The Court of Appeal had given sound reasons for disagreeing with the decision of the High Court. I therefore find no reason to depart from the decision of the Court of Appeal.

[89] For all the reasons expressed above, I dismiss the appeals with costs and affirmed the orders of the Court of Appeal. My answers to the leave questions are as follows:

Question 1:

Whether s 7 of the BBEA empowers a court to provide orders for discovery independently of O 24 of the Rules of Court 2012. The answer would be *negative*.

Question 2:

Whether the definition of 'banker's book' in s 2 of the BBEA is to be construed by taking into account current practices in the ordinary business of a bank. The answer would be *negative*.

Rhodzariah Bujang FCJ (delivering majority judgment of the court):

[90] The appellant, who was the plaintiff in the suit filed in the High Court, has been granted by this court leave to appeal against the decision of the Court of Appeal which overturned that of the High Court in respect of two interlocutory applications heard by the learned High Court judge. The respondents were the appellant's former directors and were sued by the appellant together with a company, PT Anglo Slavic Utama ('PT Anglo'), who was named the first defendant in the suit and who was allegedly under the respondents' control. The first respondent was also a substantial shareholder of the appellant. The claim against them was premised on an alleged conspiracy by all three of them to defraud the appellant and as against the respondents it was also grounded on breaches of their fiduciary duties owed to it which had caused a substantial monetary loss of USD27m to the appellant. That amount, which the appellant now seeks to recover from them, was the monies the appellant had paid PT Anglo and PT Anglo Slavic Indonesia ('PT ASI') for the acquisition of 76% of the total issued share capital in the latter by the appellant, which would indirectly gave the appellant the right over a licence to develop an oil field in Aceh Tamiang Regency, in the Province of Nanggroe Aceh Darussalam, Indonesia as explained in paras 9–10 of the appellant's statement of claim. That acquisition was done vide a sale and purchase agreement dated 28 December 2012 and which was subsequently amended vide an agreement dated 29 January 2014.

A THE APPLICATIONS

[91] I have made a conscious decision to summarily state the rudimentary background facts above, for given the nature of the leave questions granted to the appellant to appeal to this court, these are sufficient to understand the legal dispute now troubling the parties. As stated above, the dispute centers on the two applications filed by the appellant which are inter-related. The first, encl 307, on pre trial discovery of documents, was made pursuant to ss 6 and/or 7 of Bankers' Books (Evidence) Act 1949 ('the Act') and/or O 92 r 4 of the Rules of Court 2012 ('the ROC 2012'). The order sought under this application was for the plaintiff to inspect and take copies of all documents in the possession of Maybank Bhd and CIMB Bank in respect of the respondents', Nutox Ltd's, Abamon Technology Sdn Bhd's and JF Apex Securities Bhd's accounts held in the said Banks. The order which was granted by the learned High Court judge on 7 January 2019 was however stayed by the Court of Appeal but that was before the said banks had released some of the documents sought under the said order. It has to be mentioned that following clarification sought by the respondents, the learned High Court judge limited the said order to the period between 28 December 2012 to 22 September 2014.

[92] The second application, encl 395, pertains to the admission of abovementioned discovered banking documents as well as the one disclosed in an application filed earlier than the said two. That first application ('encl 48'), also made under the same legal provisions as encl 307 by the appellant, and it was to inspect and take copies of all entries in the accounts of PT Anglo, PT ASI and the three related companies of the respondents, Fast Global Investments Limited, PT Nusantara Rising Rich and Telecity Investment Limited ('the three related companies') in CIMB Bank Bhd ('CIMB Bank') and CIMB Islamic Bank Bhd ('CIMB Islamic'). The appellant was moved to make this application because shortly after the appellant filed the suit in this appeal, the first respondent through his corporate vehicle, Kingdom Seekers Ventures Sdn Bhd, filed a derivative action against the appellant as the seventh defendant, its Managing Director, Dato' Sri Chong Ket Pen, as the first defendant and six other defendants for, inter alia, breach of fiduciary duties in respect of the appellant's acquisition of shares in PT ASI from PT Anglo.

[93] I paused here to note that this derivative action was struck off by the High Court on 21 April 2015 which decision was affirmed by the Court of Appeal and the matter ended there because the application for leave to appeal to the Federal Court against the said decision was dismissed. The day after that action was filed, that is, on 28 October 2014, the first respondent called a press conference in which he alleged that the monies the appellant paid for the

acquisition of the shares were 'flowed through two layers of the companies' and he identified the three related companies being some of the recipients of the monies.

[94] The respondents did not object to the application after being served with it but Fast Global Investment Ltd and Telecity Investments Ltd did. Nevertheless, the respondents filed and managed to obtain in the High Court a stay of the said application pending an arbitration proceeding between the appellant and PT Anglo but that stay was lifted by the Court of Appeal following an appeal filed by the appellant. Thus, an order in terms of encl 48 was granted on 25 June 2018.

[95] It was following the disclosure of the banking documents under encl 48's order, that the appellant filed that similar second one under the Act, which is, encl 307. This it did because, as submitted by the appellant's counsel before us, the documents obtained show that the respondents had personally and directly profited from the monies paid by the appellant in the acquisition of the shares and also via a circuitous route of third party entities whose names I have mentioned in para 2 above.

[96] The documents disclosed pursuant to the orders granted in encls 48 and 307 were enclosed in two bundles and were supposed to be adduced through the appellant's Director of Corporate Finance (PWI) but who had since passed away. However, given the objections raised by the respondents on the admissibility of the said documents, the appellant filed a formal application, that is, this encl 395 pursuant to ss 2–5 and/or 6 of the Act and O 92 r 4 of the ROC 2012. This move the respondents endorsed as stated by the learned High Court judge in para 72 of his judgment as it was parties' common position that the issues as encapsulated in the two leave questions have a material impact on the admission of the said documents, thus requiring determination by His Lordship and the Court of Appeal. The disclosed documents pursuant to the aforesaid encls 48 and 307 were attached and marked as Annexures A & B, respectively to the said application but which I see no necessity in reproducing in this judgement of mine.

DECISION OF THE HIGH COURT

[97] The learned High Court judge allowed encl 307 but dismissed encl 395 and wrote a comprehensive single judgment for both applications in which His Lordship analysed the scheme of the Act, from the time of its historical inception and the applicability of the relevant provisions of the Act and the ROC 2012. I would now reproduce the summary of the said decision which learned counsel for the appellant had ably and succinctly done in paras 43–45

of their written submission but of course with some minor editorial amendments and modifications to suit my own specific reference to the legislation in this judgment. The said summary reads:

> 43. The learned High Court judge held that the provisions of the Act entitled the appellant to seek inspection of the banker's books and to make copies of entries in such book in order to prove its assertion regarding the flow of funds back to the respondents. The learned High Court judge held that while it is indisputably true that the intent of the legislation was to provide relief to bankers from the inconvenience of having their ledgers and other books from being removed for use in legal proceedings, the Act also, as a necessary consequence provides for a right of inspection over a banker's books as well as a right to obtain copies of entries in those books. The court held that the appellant had satisfied the test governing the principles of discovery showing the relevancy of the documents sought to the pleaded claim of the appellant. Therefore, the application did not amount to a fishing exercise.
>
> 44. The learned High Court judge held that in applying the principles governing the provision of the Act, the court would first have to make a determination on whether the documents sought to be admitted comes within the definition of 'banker's books' within the ambit of Act. His Lordship correctly opined that that was a mixed question of fact and law. If a document satisfies the said definition, then the document may be admitted under the provisions of the Act. If a document disclosed pursuant to the order made under Act did not come within the definition of 'banker's book' within its ambit, the party in receipt of such document would be entitled to adduce that document at trial, subject to fulfilment of the requirement of the requirement for proof and relevancy.
>
> 45. Finally, the learned High Court judge held that the expression banker's books under the Act is wide enough to encompass any matter coming within the definition of 'document' within the meaning of Evidence Act 1950.
>
> According to the learned High Court judge, in order to satisfy the said definition, a document must comprise any transaction record that is generated by the bank or must be a document which the bank maintains.

[98] Both parties appealed to the Court of Appeal against the said decision. The appellant was aggrieved by the dismissal of encl 395 and the respondents were too, not just by His Lordship's decision to allow encl 307 but also part of his decision in respect of encl 395 which allows documents that do not fall within the said definition in the Act to be admitted as evidence although subject to the usual requirements regarding proof and relevancy.

DECISION OF THE COURT OF APPEAL

[99] The unanimous decision of the Court of Appeal was to allow both the respondents' appeals and to dismiss that of the appellant. I am equally moved to reproduce the summary of the Court of Appeal's judgment which learned counsel for the respondents had incorporated in paras 13.1–13.4 of their

written submission for just like their legal opponents, they too have ably captured the essence of the said judgment. Likewise the same is reproduced below with same editorial amendment as I had done earlier:

> 13.1 A copy of any entry in a banker's book is to be received as prima facie evidence of such entry and of the matters, but the transactions and accounts therein recorded must be subject to fulfilment of sections 4 and 5 of the Act.
>
> 13.2 Enclosures 307 and 395 were in substance applications for specific discovery of documents. Such applications must conform to the rules for discovery under the Rules of Court 2012. The Act is only intended to facilitate the proving of copies of entries in bankers' books, the underlying aim of the Act being to avoid the need for bankers to give formal evidence of banker's books entries. The Act is not a means for discovery; where discovery is needed, this must be sought under the Rules of Court 2012. In this way, discovery is therefore the essential pre-requisite to the making of an order under the Act as the Act would only be called into play where a party had evidence in hand that it required formal proof from a banker to adduce.
>
> 13.3 As the Act is intended to facilitate the proving of copies of entries in banker's books thereby avoiding the requirements of the Evidence Act 1950, evidence under it can only be led where the requirements of that law are complied with in that it must be confirmed by either oral of affidavit evidence that the entry was made in the usual and ordinary course of business and the book is in the custody or control of the bank.
>
> 13.4 Given the clear legislative purpose of the Act, section 7 has to be understood in the context of its underlying legislative intention and other relevant legislation. Section 130(3) of the Evidence Act 1950 provides that no bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by the law of evidence relating to banker's books. Furthermore, a banker was subject to a statutory duty of secrecy under the Financial Services Act.

[100] For clarity, the Court of Appeal's conclusion at paras 100–101 of its judgement are reproduced below and it is to be noted that BBEA Order 1 and BBEA Order 2 in the said excerpt refers to the orders made in encls 48 and 307, respectively:

> [100] Having regard to the matters stated above, our conclusion are as follows — Enclosure 307
>
> We agreed with the Defendants that the BBEA was created to merely facilitate the proving of banking transactions through the admission of bankers' evidence. It was, not intended to serve as an alternative means of discovery against bankers. The ordinary principles of discovery would not be applicable in an application under section 7 of BBEA. This is underscored by the fact that there· is a specific legal framework for discovery in Malaysia, specifically Order 24 of the ROC. Respectfully, the foregoing conclusions of the learned Judge were therefore erroneous. The Plaintiff ought to have first establish its right to discovery under the ROC. We also agreed with the Defendants that the learned Judge failed to specifically identify which of the Disputed Documents were or were not 'banker's books' (Disputed Documents referred to documents purportedly obtained under

BBEA Order 1 and documents purportedly obtained under BBEA Order 2. Documents such as company documents, memorandum or resolution for opening of bank account, memorandum or resolution for change of authorised signatory) are not 'banker's books' as they do not permanently record transactions in the ordinary business of a bank.

Miscellaneous internal documents used by the bank (such as specimen signature form, remittance application form, account opening application form, correspondence and documents evidencing the closing of account) are not 'banker's books' as they do not permanently record . transactions in the ordinary business of a bank;

Cheques and paying-in slips (such as cheque deposit receipts, transaction slips are not 'banker's book' as they do not permanently record transactions in the ordinary business of a bank. They are either instructions (e.g. cheques) or documents evidencing the said instructions (paying-in slips) prepared merely for the purposes of customers' convenience.

Bank statements are not 'banker's books' as they are created not for the purpose of permanently recording transactions in the ordinary business of a bank, but for customer's reference only.

Enclosure 395

In respect of BBEA Order 1:

The Plaintiff would not be permitted to adduce under the EA documents that were improperly disclosed. Those disputed documents should be excluded for being outside the scope of the BBEA for not being copies of entries in banker's books within the meaning of section 2. The Plaintiff was required to prove and verify any of the Disputed Documents that fell within the permissible scope of the BBEA Orders under sections 4 and 5 of BBEA. Failing that, the Plaintiff was not permitted to rely on the Disputed Documents on the strength of the EA.

In respect of BBEA Order 2:

The Plaintiff was required to prove and verify any of the Disputed Documents that fell within the permissible scope of the BBEA Orders under sections 4 and 5 of BBEA. Failing that, the Plaintiff was not permitted to rely on the Disputed Documents on the strength of the EA.

[101] The learned Judge ought to have dismissed Enclosure 307 and BBEA Order 2 ought not have been made. Enclosure 395 ought to have been treated only as applying to copies of documents produced under BBEA Order 1, and, that end all the documents produced under BBEA Order 1 ought to have been determined as inadmissible under BBEA on ground that those documents were not admissible under EA.

THE LEAVE QUESTIONS

[101] Premised on the above judgments, it is clear that the legal grouse harboured by the parties before us is the interplay between the relevant provisions in the two laws, to wit, the Act and the ROC 2012 regarding the

production and discovery of banking documents and crucially in this regard is whether the former is subject to the latter.

Thus, the appellant was granted leave to appeal on these two questions of law:

Question 1:

Whether s 7 of the Bankers' Books (Evidence) Act 1949 empowers a court to provide orders for discovery independently of O 24 of the Rules of Court 2012.

Question 2:

Whether the definition of 'banker's book' in s 2 of the Bankers' Books (Evidence) Act 1949 is to be construed by taking into account current practices in the ordinary business of a bank.

MY CONSIDERATIONS

[102] I will begin by first reproducing the relevant provisions of the Act, starting with the definition of 'banker's book', followed by those relating to proof of the same and the power of the court in relation to it.

> Section 2: 'banker's book' includes any ledgers, day book, cash book, account book and any other book used in the ordinary business of a bank.
>
> Section 3: Mode of proof of entries in bankers' books.
>
> Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded.
>
> Section 4: Proof that book is a banker's book.
>
> (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
>
> (2) Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.
>
> Section 5: Verification of copy.
>
> (1) A copy of an entry is a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct.
>
> (2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.
>
> Section 6: Case in which officer of bank not compellable to produce books, etc.

An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

Section 7: Court or Judge may order inspection

(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court of Judge otherwise directs.

[103] Order 24 of the ROC 2012 on discovery of documents contains fifteen provisions but for the purpose of my judgment, the relevant one is O 24 r 7A which in itself is a lengthy one. Therefore, suffice if I just reproduce the pertinent provision which is O 24 r 7A(1) and it reads:

Discovery against other person (O 24, r 7A)

7A(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

[104] It is apt for me to pause here to mention that O 24 r 7A was only inserted when the ROC 2012 was enacted and thus it was absent in its predecessor, the Rules of the High Court 1980. Of equal importance and pertinence, though obvious from the title of the Act itself is that the Act is a pre-Merdeka law which was legislated way back in 1949. It was modelled on United Kingdom's Bankers' Books Evidence Act 1876 which Act was re-enacted in 1879 and further amended in 1979. As explained by the learned authors, Paul Matthew and Hodge M Malek QC in their book, *Disclosure* (5th Ed) at para 10.37, that law was passed '… in order to get over the difficulty and hardship relating to the production of bankers' books. If such books contained anything which would be evidence for either of the parties, the banker or his clerk had to produce them at the trial under a subpoena duces tecum, which was an inconvenience when the books were in regular use. The leading object of this Act was to relieve bankers from that inconvenience'. It also enables, said the learned authors further, for an order to be made for pre-trial disclosure of documentary evidence in the hands of the banks relating to accounts held by parties to the litigation. It is to be noted that under s 7(2) of the Act, the application for the order can be made ex parte but O 24 r 7A(2) provides that the application must be served personally on a non-party custodian of the documents.

[105] At the hearing, we were also appraised by learned counsel for the appellant, and upon due verification of the same, have no reason to doubt the veracity of the facts stated by him, that not only in United Kingdom but also in Ireland, Hong Kong and Singapore, there are similar legislations as the Act and O 24 r 7A co-existing in the aforesaid jurisdictions. Yet, submitted learned counsel further, the courts there have consistently allowed an application under the equivalent sections of the Act to inspect and make copies of banking documents despite the existence of the specific procedural law on discovery against non-parties. By way of an illustration, these legislations are tabled below:

Country	Substantive Law	Procedural Law
1. United Kingdom	Section 7 of Bankers' Books Evidence Act 1879 (Amended in 1979 as Banking Act)	Order 24 rr 9–11 of Rules of Supreme Court 1965 (Replaced by the Civil Procedure Rules 1998)
2. Ireland	Section 7 of Bankers Books Evidence Act, 1879	Order 31 rule 29 of Rules of Superior Court 1986
3. Hong Kong	Section 21 of Evidence Ordinance	Order 24 rr 9–11 of Rules of the High Court Chapter 4A
4. Singapore	Section 175 of Evidence Act (Chapter 97)	Order 24 rr 9–11 of Rules of Court 1996
5. New Zealand	Section 21 of Banking Act 1908	Order 8 r 21 of the High Court Rules 2016

[106] The Court of Appeal, submitted the appellant's counsel had fallen into grave error by failing to appreciate the trite principles established by case authorities which the court must consider in granting such an order under the Act, which is, whether the documents sought are in existence, that these documents are in the possession, custody or power of the relevant banks and most importantly are relevant to the issues to be adjudicated. He cited the case of *South Staffordshire Tramways Company v Ebbsmith* [1895] 2 QB 669 and *Williams v Summerfield* [1972] 3 WLR 131, in support of the proposition made above.

[107] Learned counsel further submitted that the Court of Appeal was wrong to draw a distinction between discovery and inspection of document because it is elementary that in order for there to be inspection, there would first have to be production. In this connection, it is pertinent to note that O 24 r 10 of the ROC 2012 is the one governing inspection of document for it provides for a notice to be served on the party who is to produce it whereas O 24 r 11 of the ROC 2012 allows for a party to make an application to court for the inspection

of particular documents where the other party has not complied with r 9 or r 10(1), objects to producing the documents in question or offers inspection at an unreasonable time and venue.

[108] Learned counsel for the appellant further bolstered their argument by referring to s 130(3) of the Evidence Act 1950 which provides that:

> (3) No bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by the law of evidence relating to banker's books,

Therefore, they submitted, the principle of *generalia specialibus non derogant* applies and O 24 r 7A being a subsidiary and general legislation do not abrogate but must yield to that of the Act.

[109] Learned counsel for the respondents, on the other hand, submitted that the interpretation of s 7 of the Act as providing an independent right of discovery is misconceived. This is because it directly contravenes the legislative intent underlying the Act which is to facilitate the adducing of banker's evidence and nothing more. It also fails to give due regard to the need to give a purposive interpretation of s 7 as provided in s 17A of the Interpretation Acts 1948 and 1967 and to do so in line with statutes which are in pari materia with the Act, that is, the Evidence Act 1950 and the Financial Services Act 2013. Section 17A provides as follows:

> In the interpretation of a provision of an Act, a *construction that would promote the purpose or object* underlying the Act (whether that purpose or object is expressly stated in the Act or not) *shall be preferred* to a construction that would not promote that purpose or object. (Emphasis added.)

[110] Citing, inter alia, Cotton LJ in *Arnott v Hayes* (1887) 36 Ch D 731, learned counsel stressed, as held in the cited case, that the object of the Bankers' Books Evidence Act 1879 is only to provide relief to a banker from having to attend court in order to produce at the trial his daily used books.

[111] As for their submission on the need to consider statutes in pari materia with the Act, they first referred to the decision of *Shah & Co v State of Maharashtra* [1967] AIR SC 1877 which quoted *Sutherland on Statutory Construction* (3rd Ed) Vol 2 that:

> Statutes are considered to be in pari materia — to pertain to the same subject matter — when they relate to the same person or thing, or to the same class of person or things, or have the same purpose or object and to be in pari materia, statutes need not have been enacted simultaneously or refer to one another.

[112] Therefore, said learned counsel, the Act must be construed with ss 90C and 130(3) of Evidence Act 1950 as well as s 133(1) of the Financial Services

Act 2013. Section 130(3) I had reproduced earlier and I would do the same now for the said ss 90C and 133(1):

> Sections 90A and 90B to prevail over other provisions of this Act, the Bankers' Books (Evidence) Act 1949, and any written law Section 90C.
>
> The provisions of section 90A and 90B shall prevail and have full force and effect notwithstanding anything inconsistent therewith, or contrary thereto, contained in any other provision of this Act, or in the Bankers' Books (Evidence) Act 1949 [Act 33], or in an provision of any written law relating to certification, production or extraction of documents or in any rule of law or practice relating to production, admission, or proof, of evidence in any criminal or civil proceeding.
>
> Secrecy Section 133.
>
> (1) No person who has access to any document of information relating to the affairs or account of any customer of a financial institution, including —
>
> (a) the financial institution; or
>
> (b) any person who is or has been a director, officer of agent of the financial institution,
>
> shall disclose to another person any document or information relating to the affairs or account of any customer of the financial institution.
>
> (2) Subsection (1) shall not apply to any document or information relating to the affairs or account of any customer of a financial institution —
>
> (a) that is disclosed to the Bank, any officer of the Bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purpose of exercising any powers or functions of the Bank under this Act or the Central Bank of Malaysia Act 2009;
>
> (b) that is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular customer of the financial institution to be ascertained from it; or
>
> (c) that is at the time of disclosure is, or has already been made lawfully available to the public from any source other than the financial institution.
>
> (3) No person who has any document or information which to his knowledge has been disclosed in contravention of subsection (1) shall disclose the same to any other person.
>
> (4) Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to be a fine exceeding ten million ringgit or to both.

[113] The significance of s 90C, submitted learned counsel and which view I endorse, is that Parliament not only intended the Act to be read in tandem with the Evidence Act 1950, it also equated the Act to a written law relating to the production, admission or proof of evidence whilst s 130(3) explicity carves out

the law on banker's book and recognises the Act as providing for the same.

[114] As for s 133(1) of the Financial Services Act 2013, learned counsel for the respondents submitted that given the clear prohibition against a disclosure of a customer's banking documents or information relating to his account since s 133(4) makes it an offence if this is done, s 7 of the Act should not be construed as permitting an open- ended and wide-ranging inspections. They further reinforced their argument that s 7 is not an alternative method of discovery by referring to s 25(2) of the Courts of Judicature Act 1964 read with para 14 of the Schedule which provides that the High Court's power to order discovery of facts or documents by any party or person is 'in such manner or may be prescribed by rules of Court'. Thus, it is their submission that by virtue of s 4 of the said Act, its provisions shall prevail over any other written law other than the Federal Constitution in the event of inconsistency or conflict between the two. Learned counsel further submitted that there is a difference between discovery and inspection from the scheme of O 24 itself where O 24 rr 3(1), 7(1) and 7A are the provisions on discovery whereas O 24 rr 9, 10(1) and 11(1) are on inspection. Therefore, the word 'inspect' in s 7, said learned counsel cannot be equated with '*discovery*' and a literal interpretation of s 7 would produce unjust and absurd result. Applying the purposive approach, concluded learned counsel for the respondents, s 7 is not a tool for discovery and question 1 should be answered in the negative.

[115] At first blush these arguments advanced by learned counsel for the respondents appears to be attractive, but I am not persuaded that is how the two legislations should be interpreted. Firstly, as rightly submitted by learned counsel for the appellant, given the co-existence of these two legislations on an almost identical subject matter, the principle of *generalia specialibus non derogant* applies and since the Act was enacted to specifically deals with banking documents, that should be the law which should govern them, not the general provisions in the ROC 2012. Granted that the Act came into existence decades earlier than the ROC 2012 or rather its predecessor, the Rules of High Court 1980, that does not automatically mean that s 7 is subject to the procedural requirements of discovery under O 24. I say this because from the way O 24 itself is enacted, it is obvious that inspection of documents is a natural consequence of an order for discovery and s 7 of the Act sidesteps that initial step by allowing inspection straight away. As explained in *Halsbury's Laws of England* (4th Ed) Vol 13 at p 2 para 1 thereof, that discovery of documents operates in three successive stages, namely:

> (1) the disclosure in writing by one party to the other of all the documents which he has or has had in his possession, custody or power relating to matters in question in the proceedings; (2) the inspection of the documents disclosed, other than those for

which privilege from or other objection to production is properly claimed or raised; and (3) the production of the documents disclosed either for inspection by the opposite party or to the court.

Therefore, it would appear from an initial reading of the above passage that inspection and production of document as provided in s 7 is part and parcel of the discovery process. However, it is stated at the subsequent p 4 at para 2 that:

Discovery should also be distinguished from the right given by various statues to obtain inspection of particular documents, as the grounds on which discovery may be resisted are not available as defences to a claim for inspection under a statue, unless it provides that they shall be available. Thus a company incorporated under the Companies Clauses Act is bound to produce its shareholders' address book for inspection by a shareholder whatever may be his motive for requiring inspection, and a taxpayer can be compelled to produce documents relating to value added tax although they may incriminate him. (Emphasis added.)

[116] It is also extremely important to note that in United Kingdom, unlike Malaysia, the specific procedures relating to discovery in the Supreme Court of Judicature Act 1873 was enacted earlier than its Bankers Books Evidence Act 1879. Yet the application of the former was not made subject to the latter. This goes to show that the disclosure of the banking documents specified under the Act was meant to co-exist independently of the procedural requirements under the general civil procedure rules. Given that the Act is adopted almost wholesale from that of United Kingdom, this historical perspective of interpreting the Act is relevant and it is even more so when in all the years before O 24 r 7A was enacted, there is no like provision in our civil procedural law which in any way impacted the power vested on the court by s 7 of the Act. The oneness of discovery process with disclosure or production of documents and its inspection is even acknowledged by our Court of Appeal in *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 3 MLJ 625 when it cited *Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149 which held that 'discovery' is often used to mean both disclosure and inspection.

[117] As lucidly explained in the *Halsbury's Laws of England* (5th Ed) Vol 48 at para 230:

The Bankers' Books Evidence Act 1879 provides that any party to a legal proceedings may apply to the court or a judge for an order that the applicant be at liberty to inspect and take copies of any entries in a banker's book for the purposes of such proceeding.

The main object of these provisions is to enable evidence to be procured and given, and to relieve bankers from the necessity of attending and producing their books. They enable a party, who formerly had the right to issue a subpoena duces tecum to compel bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copes of the books. *They do not give any new power of disclosure, or alter the principles of law or the practices with regard to disclosure,*

> *or take away any previously existing ground of privilege. Nor do they enable a party to obtain disclosure, before the trial, of entries which would be privileged or protected from production, or which are, or are sworn to be, irrelevant or which are sworn to tend to incriminate, or which are not the subject of disclosure apart from the Bankers' Books Evidence Act 1879*. Where, therefore, a party swears that the entries sought to be inspected are irrelevant, his affidavit is conclusive, and no order for inspection should be made before the trial. (Emphasis added.)

[118] I fully appreciate the existence of the Financial Services Act 2013 which makes it an offence to disclose a person's banking transactions or details and that safeguard is enhanced by s 130(3) of the Evidence Act 1950 which I had reproduced earlier in para 14. However, as is clear from the words 'except as provided by the law of evidence relating to banker's books' in the said sub-section, it is patently obvious that the law recognises a leeway and that 'law of evidence relating to banker's book' definitely refers to the Act because it was enacted earlier than the Evidence Act 1950. This consideration is further justification for me to hold that s 7 of the Act is not subject to O 24 r 7A as held by the Court of Appeal. Of course, as rightly found by the learned High Court judge, the general rule of evidence, that is relevancy, is the cornerstone of s 7 and all other discovery applications. His Lordship was equally right when he considered that from the pleaded claim of the plaintiff, the money trail is relevant to prove or disprove its allegation of the flow of funds to the respondents.

[119] Granted, as stated in the above-mentioned excerpt from the said *Halsbury's Laws of England* and in *Goh Hooi Yin v Lim Teong Ghee & ors* [1977] 2 MLJ 26 and *Pean Kar Fu v Malayan Banking Bhd (Toh Boon Pin, intervener)* [2004] 5 MLJ 519 that the provisions in the Act do not create any new power of discovery, it is clear when I read the aforesaid excerpt and the said grounds of decisions, that what was meant to be emphasised is the relevancy of the banking documents sought. In *Goh Hooi Yin* in the last para of p 29, that issue of relevancy or rather irrelevancy of the document sought is clearly stated as follows:

> Looking at the affidavit in support of the application I do not find anything to so suggest that there is some particular item in the third parties' accounts which are relevant to determine the issues before the court. The application is very much a fishing expedition.

[120] In *Pean Kar Fu*'s case, the learned High Court judge declined to exercise his power under s 7 because His Lordship held that the application for discovery should be made in the trial court but in para 5 at p 523 of the report, His Lordship acknowledged the power vested in court by s 7 when he said:

> Rightly so, there was no disagreement on the power of the court to order inspection and/or taking of copes of entries in a banker's book.

Equally pertinent to our case is the citation His Lordship made from the judgment of Roberts CJ (Brunei) in *Chan Swee Leng v Hong Kong & Shanghai Banking Corporation Ltd* [1996] 5 MLJ 133; [1996] 1 CLJ 812 where the utility and functions of that country's equivalent to our s 7 of the Act (which is also numbered s 7) is stated as follows:

> *Although s 7 of the Act is not in terms restricted to other legal proceedings, I have no doubt that this is the object of the Act. It is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them.*
>
> *The Act is not intended to provide an alternative method of discovery for a litigant who seek to bring legal proceedings against the bank itself.*
>
> *Where the bank is itself a defendant, there is provision for an order for discovery to be made under the BHCR. Section 7 is not to be used to enable any party to those proceedings to inspect the defendant's books, in order to provide evidence such as will justify proceeding against the bank.* (Emphasis added.)

[121] Premised on the considerations above, I would answer the first leave question in the positive. In doing so, I believe that I have not run afoul of the purposive approach in the interpretation of the Act for it was clearly enacted to make adducing of evidence convenient for bankers and their customers.

Second leave question

[122] Section 2 of the Act defines banker's book as follows:

> 'banker's book' includes any ledger, day book, cash book, account book and any other book, used in the ordinary business of a bank.

This is a very similar to the definition given in the United Kingdom's Act but which was amended in 1982 to move with the times and it now reads as follows:

> 'bankers' books' include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism

In the Financial Services Act 2013, 'books' carries the same meaning as that given by s 4(1) of the Companies Act 1965 and in the new Companies Act 2016.

[123] In interpreting the provisions under consideration, ss 90A–90B of the Evidence Act 1950 are equally relevant consideration because of the clear provision of s 90C.

[124] For the purpose of this appeal, the first and last mentioned sections are the relevant ones because s 90B is merely the provision on the weight to be

attached to a document or statement contained in a document which has been admitted under s 90A. Section 90C I had reproduced in full earlier and I would do so now for s 90A.

> 90A *Admissibility of documents produced by computers, and of statements contained therein*
>
> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

[125] In my view, what these legislative provisions simply means is that with the advent of technology, computerised versions of what is defined as banker's book are still admissible as evidence but does it mean that any other documents kept by the bank in relation to an individuals' banking account are admissible? Learned counsel for the appellant in their submission attempted to persuade us that it is so, going by the definition of 'books' in the Companies Act 2016 because under the said Act the definition is so wide that it includes any register or other record of information and any accounts or accounting records, however compiled, recorded or stored and also includes any document.

[126] This very definition is also made applicable to the Financial Services Act 2013 for as stated earlier it adopts the one under the Companies Act 1965 ie the Act prior to its amendment in 2016. Entry however is not defined under the Act but learned counsel for the appellant has referred us to the decision of *Barker v Wilson* [1980] 1 WLR 884 which decision was on the definition of banker's book prior to the amendment of their Act in 1979 and which definition then is in pari materia with ours Bridge LJ held as follows:

> The Banker's Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of 'banker's books' and the phrase 'an entry in a banker's book', it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm.

[127] This decision was cited with approval by the Singapore Court of Appeal in *Wee Soon Kim Anthony v UBS AG* [2003] 5 LRC 171 where the court defined its task in the said case as interpreting the expression 'other books' in

the definition of their 'bankers book' which is exactly what I have to do in this case as well. The Singapore Court of Appeal held that in interpreting that expression they should take a purposive approach and recognise the changes effected in the practices of bankers. Therefore, any form of permanent record maintained by a bank in relation to the transaction of a customer should be viewed as falling within the scope of that expression and that includes correspondence between a bank and a customer which records a transaction as it formed an integral part of the account of that customer but not notes taken by a bank officer of meetings with the customer.

[128] Learned counsel for the appellant not only tried to persuade us to apply that same purposive approach but also that in accord with modern times, we should favour an 'updating' approach to statutory interpretation, which approach was adopted in *R v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin). That approach simply means allowing the court to consider or take into account development after that law has been enacted. The justification for such an approach is explained by the court as follows:

> [45] It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time. An inevitable corollary of this is that the circumstances in which a law has to be applied may differ significantly from those which existed when the law was made — as a result of changes in technology or in society or in other conditions. This is something which the legislature may be taken to have had in contemplation when the law was made. If the question is asked ' is it reasonable to suppose that the legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted?', the answer must generally be 'no'. A 'historical' approach of that kind would usually be perverse and would defeat the purpose of the legislation.

[129] That approach this court have taken in *Yam Kong Seng v Yee Weng Kai* [2014] 4 MLJ 478; [2014] 6 CLJ 285 when an acknowledgement of debt in a short messaging system was found to be one within the meaning of s 27(1) of the Limitation Act 1953 and it held as follows:

> It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking ...

[130] On the strength of these authorities, learned counsel for the appellant submitted that the Court of Appeal had fallen into error by not adopting the said approaches and in accepting respondents' submission raised for the first time in Court of Appeal that the appellant had failed to identify what were the documents sought as banker's book, when the appellant did in fact identified

them in encls 48 and 407 as entries in the specific bank accounts of the respondents from the relevant banks as well as the specific periods of the relevant transactions.

[131] Learned counsel for the respondents whilst agreeing that 'banker's book' ought to be given an updated interpretation in accord with, and as submitted by learned counsel for appellant as well, the definition of 'computer' and 'document' in s 3 of the Evidence Act 1950, however submitted that the definition of 'document' must be construed ejusdem generis with the definition of 'bankers book' in the Act, that is, with the words 'ledger, day book, cash book and account book'. Therefore, the court is not at liberty, said learned counsel, to ignore the language of the Act, or its underlying purpose, when providing an updated interpretation of the definition of 'banker's book' and that such an exercise is permitted only to the extent the law allows. Thus, s 90A of the Evidence Act 1950, submitted learned counsel further only allows for that updating within the scope permitted by that provision.

[132] In discharging the court's interpretative task here, learned counsel for the respondents also cautioned us against applying decisions from other jurisdictions and singled out *Wee Soon Kim*'s case, which ratio I had stated earlier. His reasons against adopting the same liberal approach here, are two-fold and couched on these words:

(a) though s 17A of the Interpretation Acts 1948 and 1967 obliges a Malaysian court to interpret legislation purposively, that provision does not give licence to a court to insert words that are not there. The purposive interpretation is permitted only insofar as the law allows; the courts are not at liberty to stretch any terms beyond its logical meaning and underlying purpose; and

(b) the courts do not legislate, they merely interpret. As observed by Abdull Hamid Embong FCJ in delivering the judgment of this honourable court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312 at p 326, para 35, 'changes in the law is for Parliament to decide, not the judiciary. Judges interpret the law. And judges, under the guise of interpretation should not provide their own preferred amendments to statues'.

[133] Having given the submission and authorities cited by learned counsel for both parties my deepest consideration, I am persuaded that the definition of 'banker's book' under the Act must be given a purposive interpretation and that it is to be done with an updating approach as outlined earlier but in so doing I would still and must confine the meaning of 'other books' with 'ledger, day book, cash book and account book'. So it cannot be just any documents in the bank's possession which comes within that definition although, as I had said

earlier, those very same documents produced or kept by the bank in accordance with advancement in technology such as computers and other forms of information technology should qualify. In other words, as rightly submitted by learned counsel for the respondents, 'other books' should be considered *ejusdem generis*. Doing so does not, in my view disentitle me from adopting the same approach taken in *Wee Soon Kim*'s case because recorded transactions between the customer and the bank indeed qualifies under record or entries kept in its 'ledger, day book, cash book and account book'. As rightly noted in the judgment of the Court of Appeal at para 76 thereof, 'entry' is not defined in the Act but cross referencing it with s 34 of the Evidence Act 1950, it should be the ones recorded in a book of account regularly kept in the course of the bank's business, which is one of the conditions of admissibility under the said section as held by the Supreme Court in *Sim Siok Eng & Anor v Poh Hua Transport & Contractor Sdn Bhd* [1980] 2 MLJ 72.

[134] Based on the qualification above, I would thus answer the second question posed in the affirmative only in so far as 'the current practices in the ordinary business of the bank' relates to the technological advances which I had alluded to earlier and no other. In doing so, I would affirm the ultimate decision of the learned High Court judge as explained in para 43 of his judgment, to first determine whether the documents disclosed under the two orders come within the definition of 'banker's book' before admitting them as evidence at the trial and if not, the admission of the intended documents will have to comply with the legal requirements for the said admission. This decision I make because as pointed out by learned counsel for the appellant and this fact I had mentioned earlier, the appellant did in encls 48 and 307, identify and specify in the said applications, the entries in the respondents' and the other named entities' bank accounts with the said banks including the specific periods of the transactions. That course of action adopted by the learned High Court judge, in my view, is a fair and just one for both parties. Additionally, I would like to add, as held in *South Staffordshire Tramsway Company v Ebbsmith* [1895] 2 QB 669 and *Waterhouse v Barker* [1924] 2 KB 759, that in exercising the said power over documents which come under the aforesaid definition, the learned High Court judge is still governed by the general rules relating to admission of documents at the trial, relevancy being the cornerstone of that. As held in the latter cited case:

> It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. *It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money — as, for instance, when the customer has got the money by fraud — or other wrongdoing — and paid it into his account at the bank.* (Emphasis added.)

[135] In conclusion and for the reasons stated above the decision of the learned High Court judge is affirmed. Consequentially, I would allow Appeal

No 02(i)-48–09 of 2020(W) and Appeal No 02(i)-49–09 of 2020(W) but not Appeal No 02(i)-47–09 of 2020 (W) which is dismissed with costs to be in the cause of the trial in the High Court as agreed by the parties after the delivery of the summary of this judgment.

[136] My learned brother Justice Zawawi bin Salleh, has read this judgment in draft and has expressed his agreement with it.

Order accordingly.

Reported by Ashok Kumar